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CONVEYANCER'S NOTEBOOK

FINANCE ACT, 1955

Child's Allowance. The Finance Act, 1955, s. 2 (5), has increased the child's allowance from £85 to £100, but has departed from earlier precedent by not increasing the maximum amount of income to which a child may be entitled in his own right without the loss by his parent of the allowance; the maximum remains at £85. In Vol. 17, at p. 521, we published a precedent for payment of an annual sum equal to the maximum for the time being allowed, and we therefore draw the attention of practitioners who have used the precedent to the fact that the gross payment remains the same this year as last.

LAND VALUES CLAIMS

The time for making application for payments for depreciation of land values under Part I of the Town and Country Planning Act, 1954, has been extended until June 30, 1955, by the Central Land Board Payments (Amendment) Regulations, 1955 (S.I. 1955, No. 611).

THE MORELLE CASES

The *Morelle* cases (*Morelle, Ltd.* v. *Waterworth* [1955] 1 Q.B. 1; *Morelle, Ltd.* v. *Wakeling* [1955] 2 W.L.R. 673, noted *post*, p. 223) have raised a number of points of interest, some aspects of which are dealt with in Mr. Bland's article in the *Law Quarterly Review* for January and others in Mr. Ruoff's article, *post*, p. 190; but there is one very unsatisfactory point of procedure which emerges. If the construction of a will is in question, every person who might possibly be affected, including an unborn person, is given an opportunity of being heard, but in these cases the Crown,

who was vitally interested, was no party and found itself condemned to take over a *damnosa hereditas*. In other jurisdictions the courts will refuse to hear a case until all persons interested are given an opportunity of being heard. We think the English courts should insist on the same procedure and, where registration of title is in question, might not an opportunity be given for the Chief Land Registrar to be represented? The system of land registration has worked so smoothly that only a handful of cases on the subject has come before the courts, and it may well be that the full implications of the effect of a particular view on land registration are not realised until after the decision. The effect of the *Morelle* decisions may already be seen from *The Times* of May 11, where it is reported that the Court of Appeal held the Crown liable to perform the covenants in a lease of property forfeited by an Irish company to the Crown under the Mortmain and Charitable Uses Act, 1888.

Conveyance by Estoppel

Practitioners might be forgiven for thinking that, so far as equitable rights in land arose after 1925, they were not seriously concerned with them so long as they were unprotected by registration; there were some which affected them, *e.g.*, where a person in a fiduciary position took a conveyance for his own benefit, but there did not appear to be many. It is becoming clear that there are rather more equities which bind a purchaser irrespective of registration than it was thought, of which the most outstanding example is the wife's equity in the matrimonial home. *Hopgood* v. *Brown* [1955] 1 W.L.R. 213, noted *post*, p. 221, has added another equity—at least, it is assumed that it is an equity—for which the purchaser's solicitor must keep a look-out. Two adjoining owners agreed on the line of their boundary and one proceeded to build. The other then sold his plot and the purchaser found after completion that the agreed boundary was incorrect and the building which had been erected encroached on the land conveyed to him. The Court of Appeal held that the original owner was estopped from denying the correctness of the agreed boundary. This, if we may say so, is eminently just. The court also held that the purchaser was bound by the estoppel, which may not be so just, depending on the limits of the principle. Is notice essential to bind a purchaser? What amounts to notice? In the case of registered land, is the position the same? Registered title is guaranteed but the guarantee does not extend to boundaries. What are boundaries for this purpose? It is not usual today in

ordinary sales for there to be a survey of the land or even inspection by the purchaser's solicitor, but it seems clear that he should warn his client of the various things to look for and satisfy himself on.

Restrictive Covenants and Misdescription

Another case to which we would like to draw attention is *Simmons* v. *Pennington & Son* [1955] 1 W.L.R. 183, noted *post*, p. 219. We cannot help feeling considerable sympathy for the vendor. He had a shop to sell, but there was a restrictive covenant limiting the user to a private dwelling-house. As he had used it as a shop for many years no doubt he and his solicitors did not think there would be any difficulty, and in the ordinary course of events there would not have been. The sale was by auction and a condition provided that the property was sold subject to certain restrictions contained in a certain deed, which could be seen at the vendor's solicitors' offices, but the condition did not indicate the nature of the restrictions. As a result of an unfortunate answer to a requisition, the purchaser purported to rescind and was held entitled to do so by the Court of Appeal. The vendor then sued his solicitors for negligence and again found himself in the Court of Appeal, again to lose. We think few would differ from the court's view that the solicitors were not negligent in answering the requisition, but it seems to us that if the contract had been more explicit this difficulty would not have arisen.

Where there is a defect in the title, the most advisable course is to state the defect frankly and tell the purchaser that he can take it or leave it. Where the sale is by private treaty the matter would no doubt have been dealt with by sending a copy of the restrictions and stating that the premises had been occupied as a shop for so many years. In the case of a sale by auction this is not entirely practicable but it is not sufficient to say that the deed imposing the restrictions can be inspected. The nature of the restrictions should be described and, when it is believed that they are no longer effective, the circumstances giving rise to this belief should be explained in the conditions, and the strongest argument is open breach for some time without complaint.

OWNERSHIP IN RIVERS

By A. S. Wisdom, Solicitor

A river or watercourse consists (like Caesar's Gaul) of three parts—(1) the water flowing therein, (2) its bed, and (3) the banks.

The Water. Dealing first with the water, nobody can be said to own flowing water, but riparian owners have a natural right to the use of the water for their lawful purposes. In the case of *Embrey* v. *Owen* (1851) 6 Ex. 353 Parke B. said: "Flowing water is public and common in the sense only that all may reasonably use it who have a right of access to it, and none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession and that only during the time of his possession." A riparian owner has a right to the enjoyment of a natural stream of water on the surface as a natural incident to the right of the soil itself. He has a right to have the water come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction (*Chasemore* v. *Richards* (1859) 7 H.L.C. 382). The right to use the water of a natural stream arises from the right of access to it which landowners on its banks have by the law of nature, and not from the ownership of the soil of the stream (*Lyon* v. *Fishmongers' Co.* (1876) 35 L.T. 569).

If the person who first appropriates the flowing water, abandons the appropriation, the water again becomes *publici juris* (*Liggins* v. *Inge* (1831) 7 Bing. 682). There is also no property in percolating water until appropriated (*Ballard* v. *Tomlinson* (1885) 49 J.P. 692). Water supplied by a water undertaking to a consumer and standing in his pipes may be the subject of larceny (*Ferens* v. *O'Brien* (1883) 11 Q.B.D. 21). A proprietary interest may be created in the water of a river by statute (*Medway Co.* v. *Romney* (1861) 25 J.P. 550), but a navigation company or conservancy board do not as a rule have any proprietary right in the water by virtue of their statutes (*Att.-Gen.* v. *Great Northern Ry.* [1909] 1 Ch. 775).

The Bed. What is meant by the "bed" of a river requires some explanation and the definition is different as between a tidal and a non-tidal river.

In the case of a non-tidal river the position is clear; Smith L.J. in *Hindson* v. *Ashby* (1896) 60 J.P. 484, adopted an American decision (*State of Alabama* v. *State of Georgia* (1859) 54 U.S., at p. 427) as follows: "I take the bed of a river to be where the running water of the river makes its mark. . . . The bed of a river is that portion of its soil which is alternatively covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." The expression "bed of the Thames" as regards the non-tidal waters of that river was held in *Goolden* v. *Thames Conservators* (1891) *H.L. unreported*, to mean the soil underneath the waters of the river between banks.

The same meaning cannot be applied to tidal rivers, since it is possible to contemplate a tidal river either at low water, when the river consists of the bed, and the foreshore between the banks above ordinary high-water mark, or at high water, when the bed and foreshore are submerged (see Stuart Moore's *History and Law of Fisheries* (1903), p. 122). The only decisions available are two cases dealing with the definition of the "bed of the Thames" used in the Thames Conservancy Act, 1894, s. 87. *Pearce* v. *Bunting* (1896) 60 J.P. 695 decided that the "shore" was distinct from the bed and that the bed was the river between low water mark on either side. In *Thames Conservators* v. *Smeed, Dean & Co.* (1897) 61 J.P. 612 the court disapproved of *Pearce* v. *Bunting* and held that the phrase "bed of the river" as applied to the tidal portion of the Thames meant the soil between the ordinary high water mark on either side. If this decision is to be applied generally to tidal waters, the result is that such waters include the foreshore, and this possibility has been criticised (see Coulson and Forbes on *Waters*, p. 97 note (c)).

The soil of tidal rivers, so far as the tide flows and reflows, is prima facie in the Crown (*Malcomson* v. *O'Dea* (1863) 27 J.P. 820), and this principle was laid down in numerous earlier decisions, *e.g.*, *R.* v. *Trinity House* (1662) 1 Sid. 86; *Bulstrode* v. *Hall* (1663) 1 Sid. 148; *R.* v. *Smith* (1780) 2 Doug. K.B. 441. The right claimed by the Crown to the bed and soil of tidal navigable rivers is a right belonging to the Crown by the common law and is applicable unless excluded by a stronger title (*Att.-Gen.* v. *London Corp.* (1849) 12 Beav. 8), *e.g.*, where the Crown have made a grant of part of the soil to a riparian manor and the ownership of the soil has passed to a subject. The Crown's right to ownership in tidal waters does not affect (a) the right of navigation

which belongs to all the subjects of the realm (*Gann* v. *Free Fishers of Whitstable* (1865) 29 J.P. 243), nor (b) the right of fishery common to all in such waters (*Malcomson* v. *O'Dea, supra*).

The Crown is not of common right entitled to the soil of an inland non-tidal stream (*Johnston* v. *O'Neill* [1911] A.C. 578) and in the case of such rivers the presumption exists that the riparian owners on each side own half the bed of the river *ad medium filum aquae* (*R.* v. *Wharton* (1701) 12 Mod.Rep. 510; *Bristow* v. *Cormican* (1878) 3 A.C. 641). If a person owns the land on both sides of the river, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river (*Blount* v. *Layard* [1891] 2 Ch. 678). The presumption applies whatever the tenure of the riparian land, whether freehold or leasehold, and whether the river is navigable or not (*Tilbury* v. *Silva* (1890) 45 Ch.D. 98). The presumption does not hold good (a) in the case of canals (*Chamber Colliery Co.* v. *Rochdale Canal Co.* [1895] A.C. 564), (b) where it can be proved that the river fronting the land is in different ownership from that of the riparian land (*Devonshire* v. *Pattinson* (1887) 52 J.P. 276), (c) in the case of an inclosure award of waste bordering on a river, since an award does not carry with it the bed of the river *ad medium filum* (*Ecroyd* v. *Coulthard* (1898) 78 L.T. 682).

The soil of lakes appears to belong prima facie to the owners of the land on either side *ad medium filum aquae* (*Marshall* v. *Ulleswater Steam Navigation Co., Ltd.* (1863) 27 J.P. 516; *Johnston* v. *O'Neill* (1911) 105 L.T. 587). Where a river alters its course gradually and imperceptibly the land so gained belongs by the doctrine of accretion to the adjoining owner (*Mussumat Imam Bandi* v. *Hurgovind Ghose* (1848) 18 E.R. 753 (P.C.)), but where a river suddenly changes its course, the property in the soil does not change (*Ford* v. *Lacy* (1861) 7 H. & N. 151).

The Banks. In considering what is meant by the bank of a river reference may be made to p. 114 of Stuart Moore's *History and Law of Fisheries*, where American authorities are quoted: "A fresh water river, like a tidal river, is composed of the alveus or bed and the water, but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river. The banks are part of the river bed, but the river does not include lands beyond the banks. Fresh rivers, although not subject to the daily fluctuations of the tide, may rise and fall periodically

at certain seasons, and thus have defined high and low water marks." Little requires to be said about the ownership of banks, since they will normally be vested in the riparian owner. The right to the bed of a watercourse is not inseparably bound up with the right to the bank; an owner of both may retain one and part with the other (*Smith* v. *Andrews* (1891) 65 L.T. 175).

Where a river is placed under the jurisdiction of a board of conservators by Act of Parliament for purposes of navigation the ownership of the banks and bed does not vest in them, unless specifically vested in them by the statute (*R.* v. *River Weaver Navigation Trustees* (1824) 7 B. & C. 70n), the board are the protectors of the bed and soil for the purposes of navigation only (*Cory* v. *Bristow* (1877) 2 A.C. 262).

ILLEGAL CONDITIONS PRECEDENT AND LEGACIES OF PERSONALTY

By V. T. H. Delany, Barrister-at-Law

Most of the standard textbooks on the law of wills (*a*) contain a statement to the effect that, if a testator attempts to impose upon a devise or bequest a condition precedent which tends towards the commission of some act prohibited by law, then the condition is void. Such a condition may be either illegal or contrary to the policy of the law and, by way of illustration, it is usual to discuss those which incite the donee to commit a crime (*b*), to obtain a peerage (*c*), to live apart from his wife (*d*), or those which are in general restraint of marriage (*e*). In addition, it is said, in the case of legacies of personalty (or charged on personal estate), certain conditions may be void as being made *in terrorem*— as a threat or sanction to induce compliance with them (*f*).

Where such a condition precedent is void, the fate of the devise or bequest dependent on it falls to be determined. So far as real property is concerned, the rule is well settled: if a condition precedent attached to a devise of realty is illegal, the devise is void also (*g*). Personal property, however, is subject to a different rule, which forms the subject-matter of this paper. The rule is stated in Jarman on *Wills* (*h*) in the following terms: " . . . The civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility

(*a*) Jarman on *Wills*, 8th ed. (1951), Vol. II, 1457; Bailey, *Law of Wills*, 4th ed. (1953), 138; Theobald on *Wills*, 11th ed. (1954), 523. *Cf.* Co.Litt. 206b; Swinburne on *Wills*, Part IV, s. 6, 257.

(*b*) *Mitchel* v. *Reynolds* (1712) 1 P.Wms. 181, 189; *Shrewsbury* v. *Hope Scott* (1859) 6 Jur.(N.S.), 452, 456; Shep.Touch. 132; 2 Bl.Comm., 156.

(*c*) *Egerton* v. *Brownlow* (1853) 4 H.L.C. 1.

(*d*) *Re Moore* (1888) 39 Ch.D. 116; *Re Caborne* [1943] Ch. 224.

(*e*) *Jones* v. *Jones* (1876) 1 Q.B.D. 279; *Re Hewett* [1918] 1 Ch. 458; *Re Lanyon* [1927] 2 Ch. 264.

(*f*) *Re Dickson's Trusts* (1850) 1 Sim.(N.S.) 37, 43; *Duddy* v. *Gresham* (1878) 2 L.R.Ir. 442.

(*g*) *Egerton* v. *Brownlow*, *supra*; *Re Turton* [1926] Ch. 96.

(*h*) 8th ed. (1951), Vol. II, 1457.

was unknown to the testator, or the condition which was possible in its creation has since become impossible by act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void."

Ignoring the other contingencies which, in Jarman's view, avoid a legacy of personalty, it will readily be seen that the main difficulty in applying the principle lies in the interpretation of these two expressions *malum prohibitum* and *malum in se*. It is the present writer's intention to show that the distinction between them is both obsolete and inherently unsound, and that it is not to be supported either on the ground of authority or of common sense. Although all the commentators are in agreement on its existence in the law of wills (*i*), it has not been subject to very extensive judicial review in modern times. Accordingly, it may be of interest to refer to a recent decision of the High Court in Eire, in the case of *Lynch* v. *Lombard* (1954), unreported (*k*), which came before Dixon J.

In that case, the principal question concerned the validity of a condition as to the religious education of minors and the effect of any invalidity in such condition. A testator bequeathed a sum of money to trustees upon trust to invest and hold the investments in trust to apply the income for or towards the maintenance and education of his daughter's children, "provided they shall be brought up in the Roman Catholic faith, and subject to the application of the said income, in trust for all the children of my said daughter . . . provided they shall have been brought up in the Roman Catholic faith, who being sons attain the age of twenty-one years or, being daughters, attain that age or marry under that age, in equal shares and if there shall be only one such child the whole to be for that one, and if the said children shall not be brought up in the Roman Catholic faith and no one of them shall live to attain a vested interest in the trust legacy the same shall fall into my residuary estate." At the date of the will the testator's daughter, who had been brought up in the Roman Catholic faith, had married a member of the Church of Ireland and become a member of that Church, and had two children who, to the testator's knowledge, had been baptised in the Church of Ireland. At the date of the testator's death his daughter had three children, all of whom were being brought up as members of the Church of Ireland.

For the residuary legatees, it was urged that the condition was

(*i*) See note (*a*), *supra*.
(*k*) Noted in 88 Ir.L.T. & S.J. (1954).

a valid one, that the income could not be paid to the children so long as they were being brought up in the Church of Ireland and that the determination of the destination of the capital must be postponed until they all attained full age. In the alternative, it was said, if the condition was invalid, the whole gift failed. For the infants, it was contended that the condition as to religious upbringing was void, as contrary to public policy and to the Constitution of Eire, which makes provision for the right of parents to regulate the education and upbringing of their children (*l*). Further, it was argued that the distinction between conditions *malum prohibitum* and conditions *malum in se* should be applied here; the condition was merely *malum prohibitum*, and so the gift to the children was valid, unfettered by the condition.

In the course of his reserved judgment, Dixon J. made a careful examination of the relevant authorities and reached the conclusion that the conditions, both as to the income and capital, were void as contrary to public policy and unconstitutional. In this connection, he followed an earlier Irish decision (*m*). When he came to consider the effect of this upon the legacies, he adverted to the distinction between *malum prohibitum* and *malum in se*, but indicated that the cases and the textbooks were of little assistance. The majority of the writers draw the distinction in relation to crimes (*n*), but, as Dixon J. said, "the attempt to fetter or influence parents in the education of their children is not a crime." In his view, the present condition did not fall under either heading, and, being precedent, the legacies dependent on it failed. Accordingly, the entire legacy fell into residue, and this irrespective of whether the children should be brought up in the Roman Catholic faith or not.

In addition to the older authorities, two recent cases were cited to Dixon J. in *Lynch* v. *Lombard* by counsel for the children. The first of these, *Re Piper* (*o*), came before Romer J., as he then was, in 1946, and he held that a condition precedent that a child shall not reside with his father involves *malum prohibitum*, but not *malum in se*; hence although the condition was void, the bequest stood. In so holding, Romer J. adopted the statement of the law in Jarman (*p*) and he referred also to *Re Moore* (*q*), in which Cotton L.J. had cited the same passage with approval.

(*l*) Constitution of Eire, 1937, Art. 42.
(*m*) *Burke* v. *Quail* [1951] I.R. 216.
(*n*) See *infra*.
(*o*) [1946] 2 All E.R. 505.
(*p*) *Op. cit.*
(*q*) (1888) 39 Ch.D. 116, 128.

He also mentioned Sheppard's *Touchstone* (*r*) (which contains a similar pronouncement), and said that he was quite satisfied that the gift took effect freed from the void condition. The other case was *Re Elliot* (*s*), decided by Harman J. in 1951, where the distinction was adopted in reference to a legacy to a charity fettered with a void condition. Here, Harman J. cited Roper on *Legacies* (*t*), together with a passage from the judgment of Lord Hardwicke L.C. in *Reynish* v. *Martin* (*u*) which had been accepted by Bowen L.J. in *Re Moore* (*a*). In the Irish case, Dixon J. did not attempt to distinguish *Re Piper* or *Re Elliot*, but in holding that the condition did not fall under either head, he seems to have experienced the very natural difficulty in appreciating the difference between the two types of illegality. As he expressed it, if the condition were to be treated as being merely *malum prohibitum* in respect of capital, the children would be getting capital, but not income, in circumstances where the testator did not intend them to get either.

When authority is sought for the origin of this curious distinction, the dicta point towards its roots lying in the canon law, with a consequent importation into the law of wills through the agency of the ecclesiastical courts. Thus, in *Scott* v. *Tyler* (*b*), Lord Thurlow L.C. said : " The better opinion, or, at least, that which prevailed, was, that devises of land with which the canon law never had any concern, should follow the rules of common law; and that legacies of money, being of that sort, should follow the rule of the canon law " (*c*). It is certain that the distinction existed in Roman law, as between conditions in contracts and in legacies (*d*), although, even then, it was admitted that it had no foundation in reason (*e*). From thence, it appears, it was imported into the ecclesiastical courts, which exercised jurisdiction over wills of personalty until they were deprived of it by the Court of Probate Act, 1857. This ecclesiastical influence, indeed, was also to be seen in the development of the rules governing conditions in partial restraint of marriage, which were applied by the courts of equity, though not always without doubts, openly expressed (*f*). It accounts for the fact that the rule had no application to realty,

(*r*) Vol. I, 132.
(*s*) [1952] Ch. 217. *Cf. Re Wolffe* [1953] 1 W.L.R. 1211.
(*t*) 4th ed., Vol. I, 754.
(*u*) (1746) 3 Atk. 330.
(*a*) *Supra.*
(*b*) (1788) 2 Dick. 712; 2 Bro.C.C. 431.
(*c*) *Cf. Lowther* v. *Cavendish* (1758) 1 Eden 99, 116, *per* Henley L.K.
(*d*) G. 3. 98; Inst. 2. 14. 10.
(*e*) G. 3. 98.
(*f*) *Cf. Stackpoole* v. *Beaumont* (1796) 3 Ves. 96, *per* Lord Loughborough.

as was explained by Lord Thurlow L.C., since the ecclesiastical courts were concerned only with wills of personalty.

It is in the field of criminal law, however, that the origin of the distinction between *malum prohibitum* and *malum in se* is to be found. The long and intensive struggle between Crown and Parliament, which culminated in the enactment of the Bill of Rights, 1689 (*g*), turned largely on the power of the King to dispense with the rules of the criminal law whenever he deemed it convenient to do so. The earliest judicial discussion of the two phrases is to be found in the words of Fineux C.J. in 1496, where it was said that the Crown could grant an individual leave to commit an offence *malum prohibitum*, but not one *malum in se* (*h*), *i.e.*, those things which the King prohibited for his personal convenience were merely *malum prohibitum*, and could be dispensed with, but not offences against the "eternal law," or the common law—these were *malum in se*. In the well-known case of *Thomas* v. *Sorrell* (*i*) Vaughan C.J. devoted considerable time to reviewing the alleged distinction, which he rejected, saying ". . . I think that rule hath more confounded men's judgments on that subject, than rectified. . . ." He took the view that the distinction was an invalid one, for, as he pointed out, no act is legally *malum* unless forbidden by some law. The Bill of Rights swept away the suspending power of the Crown and the learning on *malum prohibitum* and *malum in se* should have gone with it. It lingered on, however, in the criminal law for some time, though as long ago as 1822, Best C.J. regarded it as "long since exploded" (*k*). Today, the distinction between a thing bad in itself and a thing bad only because it is prohibited by law forms no part of the criminal law of England (*l*). It survives only in the law relating to conditions in wills of personalty.

It seems that the real difficulty in construing illegal conditions precedent lies in the fact that if they are to operate in such a way as to render the gift dependent on them also void, then the conditions are not being treated as void, but as valid. This is clear from the passage in Jarman already cited (*m*), for if the gift is void, then the condition must be operative; both cannot be void. Sheppard's *Touchstone* agrees that "if the condition be

(*g*) *Cf.* Anson, *Law and Custom of the Constitution*, Vol. I, 312–4; Maitland, *Constitutional History of England*, 304.

(*h*) (1496) Y.B.Mich. 11 Hen. VII, f. 11, pl. 35.

(*i*) (1674) Vaugh, 330.

(*k*) *Bensley* v. *Bignold* (1822) 5 B. & Ald. 341; *cf.* *Aubert* v. *Maze* (1801) 2 Bos. & Pull. 374–5.

(*l*) For discussion see Glanville Williams, *Criminal Law* (1953) 47, 118, 186; 30 Col.L.R. 74 (1930).

(*m*) Note (*a*) *supra*.

precedent the condition and estate are both void" (*n*) and it is presumed that both these writers mean the first estate, not the estate which is to arise if the condition is satisfied; it is *malum in se*, and can never be satisfied.

Considerations such as the foregoing all tend to show that this strange distinction between the two types of illegal condition precedent can no longer be said to be based on any rational foundation—if, indeed, it ever possessed one. The logical course would be to abandon the distinction altogether, and either treat the condition as inoperative in every case, thus validating the legacy (a principle adopted in the developed law of Rome in aid of the legatee) (*o*), or else apply the rule in devises of realty, and avoid the legacy in every case. This latter course is open to the objection that by treating the legacy as void, the condition is assumed to be valid. Jeremy Bentham, in treating of Blackstone's exposition of the distinction, commented on it in these words: "That acute distinction between *mala in se* and *mala prohibita*; which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it; accordingly, it has none" (*p*).

With these outspoken sentiments the present writer is in complete accord and he would suggest that practical effect be given to them whenever such questions arise.

(*n*) Vol. I, 132.

(*o*) *Impossibilis condicio in institutionibus et legatis nec non in fideicommissis et libertatibus pro non scripto habetur*: Inst. 2, 14, 10.

(*p*) Bentham, *Comment on the Commentaries* (ed. Everett, 1928), 80.

THE MEASURE OF COMPENSATION ON THE COMPULSORY ACQUISITION OF LAND

By M. R. R. Davies, ph.d., ll.m., d.p.a., Barrister-at-Law

The purpose of this article is to consider the legal provisions and principles governing the amount of compensation that may be properly claimed in respect of the compulsory acquisition of land. No attempt will be made to assess the adequacy or otherwise of the overall measure of compensation provided for, but it must be emphasised that unless the fullest possible claim is made the amount eventually awarded or agreed upon may well be considerably less than that to which an owner is entitled.

At one time, property acquired compulsorily could properly be said to be "purchased," because the value of the land to the owner and its value in the open market were the respective yardsticks by which compensation was measured (*a*), but this is no longer the case, and indeed, the measure of compensation is now so far removed from the above values that it may seem completely wrong to speak of the compulsory "purchase" of land.

General Principles

Section 7 (1) of the Lands Tribunal Act, 1949, provides, *inter alia*, that the transfer of jurisdiction from the former Tribunal of official arbitrators to the Lands Tribunal shall not affect the principles on which any question is to be determined, and, therefore, the general rules for the assessment of compensation laid down by section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, as subsequently modified by the Town and Country Planning Acts, 1944–54, are still important. These rules may now be stated as follows:—

1. No allowance is to be made on account of the acquisition being compulsory (*b*).

2. (*c*) No account is to be taken of any depreciation in the value

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(*a*) See Lands Clauses Consolidation Act, 1845, s. 63, and the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, rule (2).

(*b*) Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, rule (1). Before the 1919 Act, the courts used to allow an additional 10 per cent. to compensate for the compulsory nature of the purchase.

(*c*) Rule (2) of s. 2, which provided that the value of the land was to be taken as the amount which a willing seller might be expected to realise in the

of an interest in land attributable to the designation of the land in a Development Plan as subject to compulsory acquisition (*d*).

3. The special suitability or adaptability of the land for any purpose is not to be taken into account where that purpose is one to which the land could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department, local or public authority (*e*).

4. Where the value of the land is increased by reason of the use of the land or of any premises on it in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase is not to be taken into account (*f*).

5. Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement (*g*).

This cost of reinstatement principle was applied in *Aston Charities Trust, Ltd.* v. *Stepney Borough Council* (*h*) where a hall, built for the religious and charitable purposes of a trust but temporarily used, except for two rooms, for another purpose as a result of the war, was compulsorily acquired. The reasons for basing the compensation on the reasonable cost of equivalent reinstatement were:—

(i) there was a definite intention on the part of the trust, at the time of service of notice to treat, to reinstate the hall in some other place;

(ii) in spite of the actual temporary use the premises were still "devoted to a purpose," *i.e.*, the purposes of the trust, for which there was no general demand for land; and,

(iii) the intended reinstatement of the hall some four miles away from the original site and in a different area altogether could still be described as "reinstatement."

6. Rule (6) of section 2 of the 1919 Act preserved the right to compensation for disturbance, as well as for any other matter not

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open market, has been completely superseded by the Town and Country Planning Acts, 1947 and 1954. A later general rule is accordingly inserted as a matter of convenience.

(*d*) Town and Country Planning Act, 1947, s. 51 (3).
(*e*) Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, rule (3).
(*f*) *Ibid.*, rule (4).
(*g*) *Ibid.*, rule (5).
(*h*) [1952] 2 Q.B. 642.

directly based on the value of land, *e.g.*, compensation for severance or for injurious affection.

The various possible heads of compensation still remain to the present day, so that a person whose land is compulsorily acquired may claim in respect of:—

(i) the interest in the land acquired;

(ii) severance of that land from other land held with the acquired land;

(iii) injurious affection to any other land, whether held with the acquired land or not; and,

(iv) disturbance.

The basis for assessing compensation under each of the above heads will be considered below.

7. By Part III of the Second Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946, as applied by the Lands Tribunal Act, 1949, no account must be taken of any interest in land, or of any enhancement of the value of any interest in land by reason of any building erected, work done, or improvement or alteration made, whether on the land acquired or on any other land with which the claimant was at the time directly or indirectly concerned, if the Lands Tribunal is satisfied that the creation of the interest, or the doing of any of the above things, was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.

Basis for Assessing the Possible Heads of Compensation

We have already seen that four different heads of compensation may be claimed. The rules governing the amount of compensation under each head are now principally contained in Part III of the Town and Country Planning Act, 1954.

(i) *Compensation in respect of the Interest in the Land Acquired*

Under Part V (*i*) of the Town and Country Planning Act, 1947, the price normally paid on the compulsory acquisition of land was its existing use value at the date of the notice to treat. By Part III (*k*) of the Town and Country Planning Act, 1954, compensation continues to be assessed on the assumption that the land is restricted to its existing use, but, *in addition* to the existing use value of the land at the date of the notice to treat, the amount of compensation payable in respect of acquisitions after January 1,

(*i*) ss. 50 to 57.
(*k*) ss. 30 to 37.

1955 (*l*), is increased by any "unexpended balance of established development value" (*m*) existing immediately before the service of the notice to treat (*n*). It is important to note that even if no development value has been "established" by a claim under the 1947 Act, *additional compensation*, calculated by reference to the unexpended balance of development value, may nevertheless be payable under section 35 of the 1954 Act, where the appropriate authority is satisfied that a claim would have been established if made. In all cases, however, any development value which has already been realised, as, for example, by the land being developed or by compensation being paid in respect of previous planning restrictions, will correspondingly reduce the amount of the additional compensation payable under the 1954 Act.

Apart altogether from the increase of compensation so as to include any unexpended balance of established development value, section 32 of the 1954 Act provides for the payment of *further additional* compensation in cases where expenditure has been incurred since July 1, 1948, and before the date of service of the notice to treat, on buildings or works which do not correspondingly enhance the existing use value of the land acquired.

Because the measure of compensation on the compulsory acquisition of land is not related to current *market* values and may well be much less in certain cases than the price obtainable in the open market, it should be noted that special provision is made, by section 33, for the partial protection of prospective purchasers. Under this provision a prospective purchaser of land can ensure that in the event of the land being compulsorily acquired from him by a public authority, the compensation payable will include *the value of any planning permission attaching to the land when he bought it.* This will enable him to recover *additional compensation* in cases where land purchased at full market value is acquired compulsorily before the permitted development has been carried out and the existing use value of the land correspondingly increased.

(*l*) In the case of compulsory acquisitions or sales to public authorities possessing compulsory purchase powers before January 1, 1955, ss. 5 and 6 of Part I (ss. 1 to 15) of the Town and Country Planning Act, 1955, enable similar claims to be made against the Central Land Board (not the acquiring authority) for special payments where the notice to treat was served or, as the case may be, the contract of sale was made, after August 6, 1947. The payment will carry interest at 3½ per cent. per annum from July 1, 1948, to the date of payment or to June 30, 1955, whichever is the *earlier*. For the appropriate procedure, see the Central Land Board Payments Regulations, 1954 (S.I. 1954, No. 1599). It is important to note that unless the Board allows a claim under Part I of the 1954 Act to be made at a later date, Regulation 3 requires the applications to be sent to the Board on or before April 30, 1955.

(*m*) This means the whole, or appropriate remaining part, of an established claim on the £300 million fund created under Part VI of the 1947 Act.

(*n*) Town and Country Planning Act, 1954, s. 31.

In order to obtain the above protection, however, a prospective purchaser must:—

(1) secure planning permission for the proposed development;

(2) apply in writing to the council of the county borough or county district in which the land is situated for a protection notice (*o*) stating that the council:—

(a) do not propose to acquire within the next *five years*, either compulsorily or otherwise, any interest in the land concerned, *and*

(b) have not been notified by any public authority possessing compulsory purchase powers of a proposal of that authority to acquire the land;

(3) within *three months* of the service of the above notice by the local council either complete, or enter into a bona fide contract for, the purchase of the land, *and* give notice of the completion, or, as the case may be, of the making of the contract, to the council (*p*).

It is important to note that the planning permission must actually be in force at the date of service of the protection notice if a prospective purchaser is to be entitled to the additional compensation in respect of the permission where the land is subsequently acquired compulsorily.

(ii) and (iii) *Compensation for Severance and for Injurious Affection*

Where land is compulsorily acquired, compensation may be claimed in respect of an interest (*q*) in land for damages sustained by reason of:—

(a) the acquired land being *severed* from other land held with it; and

(b) any other land, whether held with the acquired land or not, being *injuriously affected*.

Complicated provisions are contained in section 36 of the Town and Country Planning Act, 1954, regarding the measure of any compensation that may be payable for severance or injurious affection in the case of compulsory acquisitions after January 1, 1955. Briefly, a sum representing "the loss of immediate value" (*r*)

(*o*) Where appropriate, the notice *must* be given *within twenty-eight days* from the date of the receipt of the application and a fee of five shillings may be required: Town and Country Planning Act, 1954, s. 33 (1) and (4).

(*p*) Town and Country Planning Act, 1954, s. 33 (1) and (2).

(*q*) In *Oppenheimer* v. *Minister of Transport* [1942] 1 K.B. 242, it was held that the owner of an option to purchase had a sufficient interest in land to enable him to claim for injurious affection to his adjoining property.

(*r*) Defined by s. 36 (2) of the 1954 Act as the amount, if any, by which the difference in the value of the interest affected immediately before and immediately after the injurious act or event exceeds the loss of development value.

can always be claimed, but where the land affected had an unexpended balance of established development value immediately before the injurious act, or event, a further sum is payable equal to the amount of "the loss of development value" (*s*) *or* the unexpended balance referred to above, whichever is the *smaller* (*t*).

In calculating compensation for injurious affection caused to land which was not held with the acquired land, it is important to note that section 36 (7) provides that no account must be taken of the use, or the *prospective use*, of any works constructed or erected on the acquired land. In such a case, therefore, only damage sustained by reason of the actual execution of the works, and not their subsequent use, will be relevant.

(iv) *Compensation for Disturbance*

The assessment of compensation for disturbance is unaffected by the provisions of the Town and Country Planning Acts, 1947 and 1954 (*u*). We have already seen (*ante*, p. 183) that rule (6) of section 2 of the Acquisition of Land Act, 1919, expressly retains this particular head of compensation.

In *Horn* v. *Sunderland Corporation* (*a*), Sir Wilfrid Greene M.R. observed (at p. 34) that rule (6) "leaves unaffected the right which the owner would before the Act of 1919 have had in a proper case to claim that the compensation to be paid for the land should be increased on the ground that he had been disturbed."

A claim for disturbance must be founded upon an expense or loss from being disturbed, such as the trouble and expense of finding new premises, the cost of removal, the cost of any temporary storage, loss of business profits (*b*), loss of goodwill, depreciation of stock, injury to fixtures, cost of altering and fitting up new premises and of any increases in rent, rates or overhead charges, cost of new stationery and notifying customers or clients of the change of address, and any other "personal loss imposed on the owner by the forced sale" (*c*).

(*s*) Defined by s. 36 (2) of the 1954 Act as the amount, if any, by which the value of the interest affected immediately before the injurious act or event, if calculated on the assumption that, until such time as the land affected might reasonably be expected to become ripe for new development, no use whatever could be made of that land, would exceed the value of that interest immediately after that act or event if calculated on the like assumption.

(*t*) Town and Country Planning Act, 1954, s. 36 (3) and (4).

(*u*) Town and Country Planning Act, 1954, s. 36 (1) (b).

(*a*) [1941] 2 K.B. 26.

(*b*) See *Jubb* v. *Hull Dock Co.* (1846) 9 Q.B. 443, where a sum of £400 was awarded for loss of business due to disturbance on the compulsory sale of a brewery.

(*c*) *Per* Scott L.J. in *Horn* v. *Sunderland Corporation* [1941] 2 K.B. 26, at p. 49.

In *Gibbs* v. *Dover Corporation* (*d*) an award of £1,000 was made as compensation for disturbance in connection with the compulsory acquisition of garage premises.

It is important to note that claims for disturbance must be limited to damage or loss which is a *direct* result of the compulsory acquisition of the land. Damage which is too remote or of a purely speculative nature should not be included. For example, in *Collins* v. *Feltham Urban District Council* (*e*) it was held that the owner of building land, which was ripe for development, was not entitled to compensation in respect of the profits he was hoping to make as a developer from the erection of houses on the land, such profits being of too speculative a nature. Again, in *Roberts* v. *Coventry Corporation* (*f*), the Divisional Court held that an owner of land, who was also a large shareholder and director of a company, was not entitled to claim compensation for an alleged depreciation in the value of her shares in the company resulting from the probable determination of the company's yearly tenancy of the land after its compulsory acquisition by the corporation. Where, however, capital amounting to £1,040 had been expended in road construction on land but such expenditure was rendered abortive as a result of the service of notice to treat, it was held in *Wimpey & Co., Ltd.* v. *Middlesex County Council* (*g*) that compensation had to be paid in respect of that particular loss.

Finally, since payments for disturbance are not normally included in the ordinary market price of property, it *might* still be possible in certain cases for the compensation on a compulsory acquisition—namely existing use value *plus* the unexpended balance of established development value (*h*) *plus* an amount for disturbance, *plus*, *possibly*, compensation for severance and injurious affection (*i*)—to exceed the real market value at the date of the notice to treat. It should be observed, however, that where an amount for disturbance is already included in the compensation in respect of the value of the interest in the land acquired, it cannot, of course, be claimed a second time under a separate head. In this sense, rule (6) of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919 (*ante*, p. 183), does not confer a separate and independent right, so as to claim *double* compensation for disturbance. Thus, in *Mizen Bros.* v. *Mitcham Urban*

(*d*) (1952) 2 P. & C.R. 434.
(*e*) [1937] 4 All E.R. 189.
(*f*) [1947] 1 All E.R. 308.
(*g*) [1938] 3 All E.R. 781.
(*h*) See head (i), pp. 184–186, *ante*.
(*i*) See heads (ii) and (iii), pp. 186–187, *ante*.

District Council (*k*) it was held that a market gardener, whose land was ripe for building development, was *not* entitled to *both* the value of the land for *building* purposes *and* full compensation for injury to his market garden business, since he could only realise the building value of the land by first abandoning its *existing* use for market garden purposes. Where, however, the value of the existing use of the land *plus* compensation for disturbance *exceeds* the value of the land for a new and more profitable use, the Court of Appeal held in *Horn* v. *Sunderland Corporation* (*l*), that the total sum of compensation must include an *additional* sum equal to that excess.

(*k*) Unreported, July 19, 1929.
(*l*) [1941] 2 K.B. 26.

REGISTERED PROPRIETORS AND THE MORELLE CASES

By Theodore B. F. Ruoff, Solicitor

The dead hand of mortmain has fallen upon the English property of an Irish company as a result of the *Morelle* cases (*a*). The mortmain aspect of these decisions has caused surprise and raised doubts about their correctness in legal circles—doubts which can only be finally allayed when, as appears likely to happen, a similar case reaches the House of Lords (*b*). The only ground of distinction between the first and the second *Morelle* cases to which the Court of Appeal felt itself able to listen (but without agreeing with all the arguments that were used) was that the first case concerned unregistered land and the second, registered land. In the second *Morelle* case both the plaintiff company and the Attorney-General (as *amicus curiae*) put forward in court the cardinal principle that registered interests in registered land are the only record of title recognised by law; that is to say, that the register of title at H. M. Land Registry is a complete and reliable document of title, and it is this question that will be examined in this article.

The facts of the first *Morelle* case are well known but may be repeated for the sake of completeness. The plaintiff, Morelle Limited, is a foreign company, incorporated in Eire, which did not, at any material time, either hold a licence in mortmain or deliver to the English registrar of companies the requisite particulars (*c*) to enable it to hold land in England. This company bought the residue, amounting only to a trifling period, of a 99-year unregistered leasehold term. Later, when it came to sue its subtenant, its own title was challenged and the Court of Appeal held that its property was forfeited to the Crown (*d*).

The facts of the second *Morelle* case were similar except that the title of the leasehold term that the company bought was registered at H. M. Land Registry. In due course the company

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(*a*) *Morelle Limited* v. *Waterworth* (herein called the first *Morelle* case) and *Rodnall Limited* v. *Ludbrook* [1955] 1 Q.B. 1, C.A.; and *Morelle Limited* v. *Wakeling* [1955] 2 W.L.R. 672, C.A. (herein called the second *Morelle* case).

(*b*) See Hansard (Commons) Vol. 538, No. 52, col. 924 (March 14, 1955).

(*c*) See the Companies Act, 1948, s. 408.

(*d*) Under the Mortmain and Charitable Uses Act, 1888, s. 1.

lodged at the Registry a transfer in its favour which the Chief Land Registrar completed by registration without calling for production of a licence in mortmain or other evidence that would allow the company to hold land. The company thus became the registered proprietor and, once more, when it sued its subtenants, they sought to impugn the company's title.

The Court of Appeal commented upon the fact that the transfer was not made in the form required by the Land Registration Rules, 1925 (*e*), which state that " a transfer of land to an incorporated company or other corporation, sole or aggregate, shall be made by an instrument in form 35, and, save as mentioned in this rule, shall refer to the licence in mortmain or statute enabling the corporation to acquire or hold the land." Form 35 begins with the words, " Pursuant to a licence . . ." and the Master of the Rolls, in reading the judgment of the court, said that " if rule 121 had been followed the plaintiff company would never have been registered as proprietors " (*f*). Nevertheless, it is clear that when the Chief Land Registrar received the transfer his views about mortmain were those generally held by lawyers before the first *Morelle* case had been decided, namely, that the residue of a mere 99-year term was not caught by the mortmain provisions (*g*). Consequently, no doubt, in exercise of his wide discretion (*h*), he accepted a transfer in the ordinary form (form 19). Obviously, if the Chief Land Registrar habitually insisted upon strict adherence to all the many formalities of the Rules or if, as was suggested in court, the form of the document that was used could invalidate (or even affect) a title after the completion of registration, chaos would ensue and there would be widespread dislocation in the daily business of registration. Equally obviously, even if form 35 were to be used in an instance where neither the Registrar nor the applicant conceived that a licence in mortmain was needed, it would be necessary and proper to delete from the form the very words and the only words that distinguish it from the ordinary form 19. That is, however, by the way.

Although the second *Morelle* case concerned a possessory leasehold title, the judgment of the court contains a review of the effects both of first registration and of the registration of dispositions in relation to all classes of title. Counsel for the plaintiff had argued that, as registered proprietor, the company must, under the provisions of the Land Registration Act, be considered to be

(*e*) Land Registration Rules, 1925, r. 121.
(*f*) [1955] 2 W.L.R. 672, at p. 694.
(*g*) See, *e.g.*, Tudor on *Charities* (5th ed.), p. 415.
(*h*) Land Registration Rules, 1925, rr. 74, 123 and 322.

the owner of the land for all purposes, including the right to recover and receive the rent payable by tenants of the land holding immediately under it until such time as the right of the Crown to the land by forfeiture is asserted and established in proceedings for rectification of the register (*i*). In particular, he cited the following provision of the Act (*k*): "The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold, the legal term created by the registered lease, but subject to the overriding interests (if any) . . ."

Considerable argument was directed to the use of the word "deemed" in this and other sections of the Act. It was said on the one hand that the effect of deeming a man to have property vested in him is that he is to be treated as having it vested in him whether in fact he has it vested in him or not. On the other hand it was said that "deemed" means deemed for the purposes of the Act, and only so far as those purposes require, the relevant purposes here being the protection of third parties dealing with a registered proprietor for value and in good faith (*l*). However, the court rejected any idea that there was any significance in the use of the word (*m*).

The provisions of the Land Registration Act that deal with the effect upon title of first registration were not directly material to the second *Morelle* case but the court quoted them as having some bearing upon the arguments that were used. Section 5 of the Act provides, with respect to freeholds, that: "the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an estate in fee simple in possession in the land together with all rights privileges and appurtenances belonging or appurtenant thereto," subject as therein mentioned, "but free from all other estates or interests whatsoever including estates or interests of His Majesty." Sections 6 and 7 apply the provisions of section 5 to possessory and qualified titles with modifications that are suited to the intrinsic character of each of them.

(*i*) [1955] 2 W.L.R. 672, at p. 688.
(*k*) Land Registration, Act, 1925, s. 69 (1).
(*l*) [1955] 2 W.L.R. 672, at p. 693.
(*m*) *Ibid.* It is significant that in the original statute governing land registration, *viz.*, the Land Registry Act, 1862, s. 20, the emphatic statement is made that ". . . the persons originally and from time to time named and described in such record of title . . . shall . . . *be and be deemed to be* . . . absolutely and indefeasibly possessed of and entitled to such estates . . ."

As regards leaseholds, section 9 of the Act provides that: " the registration under this Act of any persons as first proprietor thereof with an absolute title shall be deemed to vest in such person the possession of the leasehold interest described with all implied or expressed rights, privileges and appurtenances attached to such interest," subject as therein mentioned, " but free from all other estates and interests whatsoever including estates and interests of His Majesty." Sections 10, 11 and 12 apply the provisions of section 9 to the cases of good leasehold, possessory and qualified titles respectively with the requisite modifications.

The Master of the Rolls commented that " the effect of these provisions would seem to be that if a corporation not authorised by statute, charter or special licence to hold land in mortmain were to acquire unregistered land, thereby incurring a forfeiture under the Act of 1888, and thereafter were to obtain registration of itself as first proprietor of the land with absolute title, such registration would vest in such corporation the fee simple estate in the land in the case of freeholds or be deemed to vest in such corporation the possession of the leasehold interest in the case of leaseholds, free from the estate or interest which had in fact accrued to the Crown by reason of the forfeiture " (*n*).

This conclusion entirely accords with the insurance principles upon which the register is kept. These principles were well illustrated by the circumstances of *Re 139 High Street, Deptford* (*o*) in which an applicant for first registration mistakenly applied to the Registry for the grant of an absolute title to land to which he had no title whatever. This he was granted owing to a concatenation of errors but, shortly afterwards, the true owner sought and obtained rectification of the register by removal of the land in question from the title of the registered proprietor (*p*). As, however, the proprietor was not fraudulent when he applied for first registration and as he had been deprived of the absolute title to land which had been conferred on him by registration, he sought compensation from the Land Registry insurance fund and was paid £1,278 for his loss of land which, before registration, had never been his (*q*). In other words, the facts leading to first registration are immaterial because a registered proprietor owns an estate by virtue of registration and not because he claimed to be the owner before registration.

(*n*) [1955] 2 W.L.R. 672, at p. 689. *Cf. Re Suarez (No. 2)* [1924] 2 Ch. 19.
(*o*) [1951] 1 Ch. 884. And see 18 Conveyancer (N.S.) pp. 130 *et seq.*
(*p*) Under the Land Registration Act, 1925, s. 82.
(*q*) Under *ibid.*, s. 83.

Any other conclusion than this would appear to have two extraordinary corollaries. The first is that all the energy and skill devoted by the staff of the Land Registry to the examination of title on the occasion of first registration is a waste of time and money because it does not establish the title of any person. The second is that the Land Registry insurance fund does not provide a system of insurance in any ordinarily recognised meaning of that word. (Yet persons who have suffered loss have been compensated out of this fund.) Happily, however, the second *Morelle* case shows that these corollaries do not flow from it. On the contrary, the Court of Appeal has unanimously demonstrated its belief that a first registered proprietor obtains a title that is better, or never less good, than that which he had before registration (*qq*).

The position in regard to dispositions of property already registered, as expounded by the Court of Appeal, is less satisfactory. Although it has sometimes been suggested that the title of a first registered proprietor is less secure than that of a subsequent proprietor, there is the highest authority for saying that no such distinction between them exists (*r*). Yet the second *Morelle* decision seems to imply a novel and contrary view. The effect of registration of a disposition, as described in section 20 of the Act with respect to freeholds registered with an absolute title is that "a disposition of the registered land . . . for valuable consideration shall, when registered, confer on the transferee . . . an estate in fee simple . . . or other legal estate expressed to be created in the land dealt with . . . ," subject as therein mentioned, " but free from all other estates and interests whatsoever including estates and interests of His Majesty; *and the disposition shall operate in like manner as if the registered transferor . . . were* (*subject to any entry to the contrary in the register*) *entitled to the registered land in fee simple in possession for his own benefit.*" Subsections (2) and (3) of the same section apply the same provisions to registered dispositions for value of freeholds which are registered with a qualified or a possessory title with modifications that are suited to the peculiar character of these classes of title. There are parallel provisions governing leaseholds (*s*).

The reader will readily perceive that all these provisions are substantially the same as those used about the effect of first

(*qq*) *Cf. Gibbs* v. *Messer* [1891] A.C. 248, at p. 254; *Commonwealth* v. *State of New South Wales* (1918) 25 C.L.R. 325, at p. 341; *Re 139 High Street, Deptford* (*supra*).

(*r*) See *Assets Company, Limited* v. *Mere Roihi* [1905] A.C. 176, J.C., at p. 202, and cases there cited.

(*s*) Land Registration Act, 1925, s. 23.

registration except that the phrase which has been placed in italics is added. Largely on the strength of this addition, however, the court came to two conclusions. One effect of the provisions, so it held, is that if registered land is transferred to a corporation which is not authorised to hold land and the transfer is completed by the registration of the corporation as proprietor, it can thereafter, by a registered disposition for valuable consideration, vest the land in the purchaser free of the forfeiture which had in fact been incurred by reason of the transfer in mortmain to the transferor corporation (*t*). The other effect is that in the circumstances of the second *Morelle* case a transferee corporation cannot itself acquire a title free from forfeiture. The provisions referred to above were said to be designed to protect a purchasing transferee from defects in his transferor's title, such as a forfeiture subsisting at the date of the transfer against the registered estate in the transferor's hands, and not to relieve the transferee from a defect in the transferee's own title, such as a forfeiture arising on the completion by registration of the transfer by reason of the transferee's own lack of authority to hold land in mortmain (*u*).

With the greatest respect, this interpretation has been gained by a straining of the meaning of words. In the result, the Court of Appeal appears, *at first sight*, to have enunciated a new and disturbing doctrine of deferred indefeasibility of title. In other words, prima facie, the court seems to have said that there is no guarantee that a registered transferee *has* a good title although he possesses the magic power to *transmit* a good title to a bona fide purchaser for value. If this is a true paraphrase of the result of the second *Morelle* case, and if it is of general, instead of strictly limited, application, it provides little comfort for registered proprietors. Indeed, an absolute title is made to appear like an appetising but elusive carrot which is always dangled just out of reach of the donkey's mouth. The reader should note the qualifying words " at first sight " because the writer hopes to demonstrate that no general principle emerges from the second *Morelle* case.

The second *Morelle* case revolves around the savings of section 80 of the Land Registration Act. This states that: " Subject to the express provisions of this Act relating to the effect of first registration of title and the effect of registration of a disposition for valuable consideration, nothing in this Act affects any right of His Majesty to any *bona vacantia* or forfeiture." All the express

(*t*) [1955] 2 W.L.R. 672, at p. 690.
(*u*) *Ibid.*

provisions here referred to (*a*) clearly state that the estate which is vested in the proprietor is subject to specified (but, for present purposes, immaterial) rights and interests, but is free from all other estates and interests of His Majesty." If these words are read into section 80, as section 80 itself says they shall be, then logically it is difficult to see how a registered estate could ever be treated as forfeited to the Crown without rectification of the register (*b*). The express provisions are not made subject to forfeiture. On the contrary, the forfeiture provisions are made subject to the express provisions which free the proprietor's estate from all rights of the Crown. Be that as it may, the Court of Appeal has come to the conclusion that section 80 means that registered land is to be forfeited to the Crown in any case in which it would have been so forfeited if unregistered, save in so far as the sections of the Act concerning the effect of first registration and the registration of dispositions for valuable consideration expressly provide that these operations are to discharge the land from any right of the Crown by way of forfeiture (*c*). The court added that the forfeiture, being unaffected by the provisions of the Land Registration Act, took effect without any rectification of the register and was not suspended pending an order for rectification or contingent upon such an order being obtained (*d*). This is important as showing that the interest of the Crown was not a normal interest adverse to the registered proprietor's estate such as would ordinarily lead to rectification.

Then came this statement: ". . . The plaintiff company cannot escape the forfeiture consequent upon the registration of the disposition for value in its favour on the ground that there was an earlier forfeiture from which the land was freed under section 23 by the registration of such disposition. If this were not so, the strange result would ensue that transfers for value of registered land to corporations not authorised to hold land in mortmain could always be made without giving rise to a forfeiture of the land in the hands of a transferee corporation (*e*)."

With the greatest respect, however, when such a result is viewed against the background of the curative and insurance functions of the Land Registry, there is nothing strange in it. On the contrary it is normal. It is the kind of result that one would expect and it is the kind of result that is produced in other countries

(*a*) Land Registration Act, 1925, ss. 5, 6, 7, 9, 10, 11, 12, 20 and 23.
(*b*) *Ibid.*, s. 82.
(*c*) [1955] 2 W.L.R. 672, at p. 688.
(*d*) *Ibid.*, at p. 692.
(*e*) *Ibid.*

in the British Commonwealth where the principles of registration of title are perhaps more clearly appreciated than in England (*f*). It is in fact a result which is not dissimilar from that described earlier in this article where a man with no title to land acquired title to it by virtue of registration and was then compensated for his loss when he was deprived of it (*g*). Any other result detracts from one of the principal objects of land registration, namely, that of giving certainty to the title to real estate (*h*). In short, there is nothing extraordinary in the notion that a proprietor whose title was defective, but was blessed by the act of registration, should be entitled to all the benefits conferred by the Land Registration Acts upon registered proprietors, including the right to be indemnified against loss. It seems that nothing less than fraud can deprive a proprietor of this right (*i*). This policy is a deliberate departure from that which existed under earlier legislation (*k*).

It remains to consider whether the second *Morelle* case cuts across the important principle mentioned in the last paragraph. Does it cast doubt upon the reliability of registered titles and so cause harm to registered proprietors? Is the fact that, although Morelle Limited was named as the registered proprietor, the legal estate was vested, not in it, but in the Crown, likely to make people lose faith in the register as a conclusive record? The writer does not doubt that the answer to both these questions is "No." The legal estate cannot, of course, be *in nubibus* and normally a divesting of it is impossible without formal rectification of the register. But the court held that Morelle Limited was divested without an order of rectification and there are other instances where this can happen. The nearest analogies to the *Morelle* position are those of a dead intestate proprietor, whose estate is automatically vested in the Probate judge (*l*), and a bankrupt proprietor, whose estate is automatically vested in his trustee in bankruptcy (*m*). There is, of course, no immediate removal from the register of the names of the deceased proprietor and the debtor. Yet in neither of these cases would it occur to anyone to suggest that, merely because the legal estate was not vested in the proprietor named, the register of title was not as conclusive and reliable a document as can be humanly devised.

(*f*) See, *e.g.*, *Boyd* v. *Mayor of Wellington* [1924] N.Z.L.R. 1174.
(*g*) *Re 139 High Street, Deptford* [1951] 1 Ch. 884. The order for payment of indemnity was made by the Chief Land Registrar and is not therefore mentioned in the report.
(*h*) See the preamble to the Land Registry Act, 1862.
(*i*) Land Registration Act, 1925, s. 83 (5) (*a*).
(*k*) Land Transfer Act, 1897, s. 7 (3); *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47.
(*l*) Administration of Estates Act, 1925, s. 9.
(*m*) Land Registration Act, 1925, s. 61 (5).

A close reading of the *Morelle* judgment suggests that it rests upon a similar basis to the cases of the intestate and the bankrupt and that the decision is not of general application but, rather, of extremely limited application in peculiar and rare circumstances. As was pointed out earlier, the decision revolves around the saving to the Crown of its rights on forfeiture (*n*), even though the Court of Appeal may have somewhat strained the provisions in question. If those provisions had been omitted from the Act, it is inconceivable that the court could have reached the decision it did, namely, that a foreign company, by its own act, caused the forfeiture of its registered leasehold land, because at all material times its interest and estate were liable to forfeiture (*o*). Therefore it is clear that the circumstances are special and that the registered title of an English corporation, and *a fortiori* the titles of individual owners of all kinds, could not possibly, in the very nature of things, be similarly impeached. And even the foreign company whose title is forfeited can nevertheless transfer a valid and indefeasible title (*p*). If this conclusion is a correct one no one need lose faith in the efficacy of the register of title. If, on the other hand, this conclusion is false, it would seem that the Land Registration Acts ought to be amended in order to repair a loophole in the principle that a registered title is (subject to known exceptions) an unassailable one. But the House of Lords has yet to consider the matter.

(*n*) Land Registration Act, 1925, s. 80.

(*o*) *i.e.*, its equitable interest before registration and its legal estate thereafter. *Cf.* ss. 19 (1), 22 (1) of the Act.

(*p*) [1955] 2 W.L.R. 672, at p. 690.

PERSONAL REPRESENTATIVE OR TRUSTEE?

By B. S. Ker, m.a.(Cantab.), Solicitor

The recent decision in *Harvell* v. *Foster* (*a*) sets us musing on that venerable puzzler, When does a personal representative become a trustee? It also, alas, (though the point strictly affects the subject-matter of this article not in the least) engages us with other hardships of lawyers, notably those of the defendants who were helpful and generous solicitors but against whom judgment went in the end. Even the Lord Chief Justice was overruled by the Court of Appeal! However, of the case itself more by and by. Our serious thoughts bend to the question before mentioned, When does a personal representative . . .?

We may start in mild confusion by observing that a personal representative in a general way resembles a trustee and, as to the degree of diligence required of him in performing his duties, *is* a trustee (*b*). Further the definition of "trustee" in the Trustee Act, 1925, includes, where the context admits, a personal representative (*c*).

Nevertheless the offices of personal representative and trustee respectively are quite distinct and, for some purposes, mutually exclusive. Thus:—

(i) Different rules sometimes apply to the running of time against personal representatives and trustees respectively. (See the Limitation Act, 1939, ss. 19 and 20; and *Re Timmis* (*d*).)

(ii) One of two or more personal representatives can act apart from the others in disposing of personal estate, but trustees must always act together (*e*). For example, in *Attenborough* v. *Solomon* (*f*), S, a trustee under a will, pledged some trust property for his own ends and later died. His co-trustees sought to recover the property from the pawnbrokers, who had received it bona fide and without notice of the trust. The case turned on whether S was an executor or trustee when he pledged. If he was an executor he gave the pawnbrokers a good title, but if he was a trustee he

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(*a*) [1954] 2 Q.B. 367.
(*b*) *Re Marsden* (1884) 26 Ch.D. 783, *per* Kay J. at p. 789.
(*c*) s. 68 (17).
(*d*) [1902] 1 Ch. 176: and Preston & Newsom, *Limitation of Actions* (3rd ed.), p. 188.
(*e*) See *Luke* v. *South Kensington Hotel Co.* (1879) 11 Ch.D. 121.
(*f*) [1913] A.C. 76.

did not. On the facts he was held to have been a trustee and the pawnbrokers had to return the property to the plaintiffs.

(iii) A personal representative can neither appoint another personal representative to act with him, nor can he retire from his office (*g*). But a trustee can, within limits, do either or both (*h*).

(iv) Suppose X dies intestate. Administration is granted to Y. Y appoints Z his executor. Y dies. Some of X's affairs still need attending to. Can Z attend to them? The answer depends on whether Y was an administrator or trustee in respect of those affairs. If he was a trustee, Z can deal with them because under section 18 (2) of the Trustee Act, 1925, ". . . the representative . . . for the time being of a sole trustee . . . shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole . . . trustee" until the appointment of new trustees. If, however, Y was an administrator, Z will have no such right. Somebody will need to take out a grant *de bonis non* of X's estate.

It will be appreciated that when any of the points in (i) to (iv) arise the question "personal representative or trustee?" must be definitely answered one way or the other. There can be no saying "Oh well, he's a bit of each!"

Roughly, what are the respective functions of personal representative and trustee? To the former the law virtually says, "Before any gifts out of the estate can take effect all its debts and liabilities must be met. It is your duty to meet them and you can use the entire estate for the purpose." Obviously the key ideas here are (a) the necessity and importance of discharging debts and the like and (b) wide powers over the deceased's assets to this end. An executor is not fettered by such thoughts as, "I cannot pay that debt because I shall be interfering with so-and-so's legacy under the will if I do." His powers are paramount (*i*). To the trustee, on the other hand, the law says: "You must carry out the duty defined by the settlor. You will be in trouble if you exceed or fall short of it." The key idea here is *definition*. The trustee must constantly see to the exact area of his trust. When therefore a testator gives in his will legacies to A and B, devises to C and D and so forth, what is he doing if not defining? He is creating trusts. And when his executor has met all the estate's

(*g*) See, however, the Public Trustee Act, 1906, ss. 5 and 6.

(*h*) s. 36 (appointment and retirement) and s. 39 (retirement) of the Trustee Act, 1925.

(*i*) See *Ewer* v. *Corbet* (1723) 2 P.Wms. 148 and *McLeod* v. *Drummond* (1810) 17 Ves. 152.

liabilities and takes up the will to carry out these directions he is acting as a trustee and not as an executor at all (*k*). The proposition therefore emerges that as soon as the personal representative has paid the debts, duties and testamentary expenses of the estate, he becomes a trustee of the residue in his hands and ceases to be a personal representative *quoad* that residue as then known. This needs, perhaps, some enlargement, because in practice debts, duties and the like are discharged at different times. More accurately the position seems to be as follows:—

(i) An asset in the estate *specifically* disposed of in the will vests in the legatee concerned as soon as the executor assents, *i.e.*, decides he does not require it for administration purposes. Thus, in a case where the question was whether the estate or the beneficiary should bear the cost of transferring the legacy to the possession of the beneficiary it was said: "When there is a specific legacy the first duty of the executor is to consider whether he assents to it or not. If he assents to it the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them and to do what is necessary (*l*)." In a similar case, Astbury J., after quoting this passage, said ". . . these are costs and expenses which the separate specific legatees must pay in order to complete their title to their specific property, which *after assent* [the executors] are holding as trustees for them and not as executors (*m*)."

(ii) With regard to residue generally the personal representative does not become trustee until every debt, liability and expense has been paid or met. For example, in *Eaton* v. *Daines* (*n*) a beneficiary under a will sought to impeach an appointment of trustees made by the executors, one of whom had also purported to retire from the trust created by the will. As only trustees could have made the appointment, the question was whether the appointors were executors or trustees. Kekewich J. held that "as the estate was clear" the deed of appointment was good. Previously he had apparently defined what he meant by "clear" by saying ". . . cleared by payment of debts and funeral and testamentary expenses . . ."

(*k*) Another point is that the executor gets his powers from the general law, by virtue of his office. The trustee gets his powers from the will: see *Attenborough* v. *Solomon* [1913] A.C. 76, at p. 82.

(*l*) *Re Scott* [1915] 1 Ch. 592, 607.

(*m*) *Re Grosvenor* [1916] 2 Ch. 375, 378.

(*n*) [1894] W.N. 32.

It is well to keep the ideas in (i) and (ii) distinct. This article is only concerned with (ii).

The exact moment when the transformation to trusteeship in either case happens is a question of fact (*o*). It should also be noted that the transformation is only *quoad* the residue. The personal representative remains abstractly the deceased's personal representative for the whole of his life (*p*).

So much for the general rule. We will now consider in more detail what happens on an intestacy.

It will be remembered that an intestate's estate, according to section 33 of the Administration of Estates Act, 1925, "shall be held by his *personal representatives*—

"(a) as to the real estate *upon trust* to sell the same; and

"(b) as to the personal estate *upon trust* to call in, sell and convert into money such part thereof as may not consist of money . . . ." Section 39 (1) says: "In dealing with the real and personal estate of the deceased his *personal representatives* shall, for the purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have—. . . (ii) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale . . . ." Section 46 (1) says: "The residuary estate of the intestate shall be distributed or held *on the trusts* mentioned in this section." It then goes on to lay down the canons of descent. These, it will be remembered, include *inter alia* a life interest for a surviving spouse; also, for infant beneficiaries, certain trusts during minority.

Certain other provisions are worth noting because of the language used. Section 47 (1) (iii) provides for bringing into hotchpot any settlement made on an infant beneficiary by the intestate "at a valuation . . . in accordance with the requirements of the *personal representatives*." Subsection (iv) reads: "The *personal representatives* may permit an infant contingently interested to have the use and enjoyment of any personal chattels in such manner . . . as the *personal representatives* may consider reasonable . . . ." Section 47A (1) which deals with the power of a surviving spouse to redeem his or her life interest says ". . . the personal representative shall purchase or redeem," etc. Subsection (6): "An election under this section shall be exercised . . . by notifying the *personal representative* . . . ." It will have been noticed that these selections from

(*o*) ". . . the assent may be inferred from his conduct." *Attenborough* v. *Solomon* [1913] A.C. 76, at p. 83.

(*p*) ". . . for an indefinite time." *Ibid.*, at p. 83.

the Act refer to the person who carries out the trusts arising on an intestacy not as a trustee, but as a personal representative. Now the definition in the Act (*q*) of "personal representative" does not include "trustee."

What, then, is an administrator after he has "cleared" the estate? Is he a personal representative still or a trustee for the purposes of those occasions (*r*) when it is important to know exactly which of the two he is?

In *Re Ponder* (*s*) an administratrix was anxious to appoint the Public Trustee an additional trustee with her to manage part of the estate. Sargant J. held that she could do this. He said, "That the court may appoint a new trustee to act with an executor where all the debts and the expenses of the estate have been paid, and the estate has been cleared, and the executor is left merely a trustee for residuary legatees, seems quite clear. And that is so because, when the estate has been wound up and the residue ascertained, the executor has ceased to be an executor and has become a trustee for the person entitled to the residue. And I cannot see why the same reasoning should not apply to the case of the administratrix in this case." Later he said "*Eaton* v. *Daines* (*supra*) . . . shows clearly that when an estate has been wound up, and the trust property is in the hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee, and therefore a power exists to appoint a trustee; and I see no reason why the same result should not follow in the case of an administratrix." This decision was followed in *Re Pitt* (*t*) which adds nothing to our discussion.

In *Re Yerburgh* (*u*) administrators had bound themselves (in their bond) to vest the estate, after it had been cleared, in trustees upon the statutory trusts laid down in the Administration of Estates Act, 1925. When administration had been completed they asked the court in effect if they could appoint themselves trustees for this purpose. Romer J. held that they could, the report stating ". . . his view was that section 33 of the Administration of Estates Act, 1925, had imposed certain duties on legal personal representatives under which they became trustees when the estate had been fully administered."

These two cases are authority for saying that the general rule applies on an intestacy, *i.e.*, an administrator becomes a trustee

(*q*) s. 55 (1) (xi).
(*r*) See *ante*, pp. 199–200.
(*s*) [1921] 2 Ch. 59.
(*t*) (1928) 44 T.L.R. 371.
(*u*) [1928] W.N. 208.

when he has cleared the estate, even when there are (as there were in *Re Yerburgh* (*a*)) life and minority interests still extant. The practical convenience of this view is that there is no need for a grant *de bonis non* to be taken out if a sole or surviving administrator dies after administration but before the period of distribution has arrived (*b*).

Tomlin J., however, in *Re Trollope* (*c*) took another view. He pointed out what we have already noticed, that the definition of personal representative in section 55 (1) (xi) of the Administration of Estates Act, 1925, does not include a trustee. "It is therefore plain," he said, "that the expression 'personal representative' does not include trustees in the ordinary sense." He went on to explain the references in the Act to trusts as follows: ". . . under these elaborate and complicated Acts the law of intestacy is changed and . . . on . . . an intestacy there may be someone whose interest is for life only, as, for instance, the widow of the intestate, and under section 33 of the Administration of Estates Act, 1925, powers *resembling those of trustees* are conferred on personal representatives." Later he said "[section 39 (1)] is dealing, first, with personal representatives in their *ordinary* capacity when it refers to their dealing with the deceased's property 'for the purposes of administration.' Then it deals with their position during the postponement of distribution when they are *placed in the position of trustees*—that is, when the personal representatives are unable to distribute by reason of the infancy of any beneficiary or 'the subsistence of any life interest.'" The point of all this seems to be that an administrator is essentially a personal representative but with certain statutory trusts tacked on to his office.

Now comes *Harvell* v. *Foster* (*d*). The decision was really a judicial construction of the words in an administration bond "well and truly administer according to law." The administrator in this case had absconded with several hundred pounds of money which he was supposed to be holding on the statutory trust for his wife until she attained 21. The wife consequently looked to the bondsmen, her former solicitors, to recoup her loss. They (the defendants) had on behalf of the husband paid the debts and "cleared" the estate and had sent a cheque to him of the residue to hold on trust as before mentioned. They contended, consequently,

(*a*) [1928] W.N. 208.
(*b*) See para. (iv), *ante*, p. 200.
(*c*) [1927] 1 Ch. 596. See also Mr. J. M. Lightwood's letters in 63 L.J. 282 and 310.
(*d*) [1954] 2 Q.B. 367.

that the administrator (husband) had completed administration and had become a trustee; that he had therefore fulfilled the terms of his bond and that they were accordingly not liable. The judge at first instance, following *Re Ponder* (*e*), accepted this argument and dismissed the action. The Court of Appeal however reversed him. Sir Raymond Evershed M.R. said (*f*) "whether or not [*Re Ponder*] was rightly decided on its own facts, it is unnecessary for us to determine. But, as we have earlier indicated, we are unable to accept the view, which Sargant J.'s language read without qualification would seem to support, that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially interested, the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative and in particular from the obligation of any bond he may have entered into for the due administration of the estate. We would add that, in our view, the duty of an administrator, as such, must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any) and where, as here, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant. At least until the administrator can show that he has done this, it cannot, in our judgment, be said of him that he has duly administered the estate according to law."

It will have been noticed that the court did not overrule *Re Ponder* (*g*) but it is difficult to see how that case and the view expressed in *Re Yerburgh* (*h*) can stand. It is submitted, in the light of the authorities discussed above, that the law now stands like this:—

(a) Where there is a will, the executor becomes trustee of residue when he has "cleared" the estate. This also happens if the will creates life and minority interests.

(b) On a total intestacy the administrator does not become a trustee until the life interest (if there is one) has come to an end or postponement of an infant's interest (if there is one) ends by the infant's attaining 21. In other words, he becomes a trustee only when the period of distribution arrives, *not* when he has cleared the estate.

(c) On a partial intestacy he becomes a trustee of the will as soon as the estate is cleared, but remains a personal representative

(*e*) [1921] 2 Ch. 59.
(*f*) [1954] 2 Q.B. 367, at p. 383.
(*g*) [1921] 2 Ch. 59.
(*h*) [1928] W.N. 208.

quoad any assets not disposed of by will until the period of distribution arrives.

One of the practical results of (b) and *pro tanto* of (c) is that the useful effect of the decisions in *Re Ponder* and *Re Yerburgh* (*i*) —namely, that an administrator, after he has cleared the estate, can, if need be, appoint a new trustee or retire from the trust because he is himself regarded as a trustee—is now lost. However, it is suggested that this drawback can be overcome in the following way: Under section 39 of the Administration of Estates Act, 1925, an administrator has " . . . for the purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest . . ." all the powers of trustees for sale. In spite of the side note to the effect that this section relates to powers of management the language is wide enough to import the power to appoint new trustees and retire under section 36 of the Trustee Act and the power to retire under section 39. Section 36 does not of course permit the appointment of an administrator. But it is suggested that after he has cleared the estate and embarked on the remaining statutory trusts, an administrator has power under the Administration of Estates Act, 1925, s. 39 (bearing in mind the definition of " trustee " in the Trustee Act, 1925, s. 68 (17)) to appoint a new trustee and, if need be, retire from the trusts. (He would not be able to retire from the *office* of personal representative.) This would result, admittedly, if the administrator did not retire simultaneously, in a trustee's being yoked to an administrator with the differing consequences mentioned on pages 201, 203, *ante*.

In conclusion it would seem that there is still in the main a discernible pattern in this part of the law. The offices of personal representative and trustee have been put together very closely by statute where there is an intestacy, but the mixture is more like the wash of a watercolour over another dry colour than an unsightly smudge of two wet ones together.

(*i*) *Supra*.

THE INCIDENCE OF SCHEDULE A TAX

By Peter E. Whitworth, b.a., Barrister-at-Law

The coming revaluation of property for rating purposes will be followed in the normal course by a revaluation for income tax, when a widespread rise in Schedule A assessments can be expected. The increases may bring an unpleasant shock not only to landlords but to occupiers. Leases commonly refer to Schedule A tax as " landlord's property tax " and although in a general way that is true, the instances in which tenants and occupiers generally have to bear the burden themselves are much more frequent than is commonly supposed. Many difficulties arise from the archaic nature of the legislation, which although appearing in the Income Tax Act, 1952, is a mere consolidation of statutes extending over some 150 years. It betrays its origin by using the same words for different things and different words for the same thing.

The Charging Rule

Schedule A charges tax " in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom capable of actual occupation, for every twenty shillings of the annual value thereof " (s. 82).

In this context, " property " may be something a long way short of anything in the nature of a freehold (*C. I. R.* v. *Forth Conservancy Board* (1929) 14 T.C. 709, Clyde L.P. at p. 715). It includes any right of occupation which gives the occupier the benefit of the annual value (*Shanks* v. *C. I. R.* [1929] 1 K.B. 342, Greer L.J. at p. 363).

Thus the general rule is to assess the occupier (s. 105) and to give him certain limited rights to deduct tax from any rent he pays. The occupier is the person principally liable and it is not open to him to take the point that he pays on the landlord's account (*Drughorn* v. *Moore* [1924] A.C. 53).

It is the purpose of this article to examine the complicated rules governing the liability to pay Schedule A tax to the Revenue and the rights to deduct such tax from rent.

Who is the Occupier

Section 105, after directing that Schedule A tax is to be charged on and paid by the occupier for the time being, defines " occupier "

as "every person having the use of" the "land or tenements." Physical presence is unnecessary; a sewerage authority may "occupy" its sewers (*Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* [1907] 1 K.B. 490). An owner who has vacated the property has the use of it, for this purpose, even though he does not actually use it (*Bertram* v. *Wightman* [1936] 2 K.B. 521). On the other hand, a company which had taken a 99-year lease of minerals under surface-land occupied by another tenant, but which had not yet entered, was held not to be an occupier of the minerals (*Hill* v. *Gregory* [1912] 2 K.B. 61). Where an apartment house is assessed as one unit, the landlord does not occupy that unit, even though he retains control of the common staircase, and one apartment is for the time being empty (*Thorley* v. *Payne* [1943] K.B. 306). As to the circumstances in which the apartments could be assessed separately, see *post*, p. 216.

An employer "occupies" the house which he requires his employee to live in, as far as section 105 is concerned (*Reed* v. *Cattermole* [1937] 1 K.B. 613). The employee would still be the occupier for the purposes of section 103 (1) (c) (which provides special allowances for hospitals, etc.), and of section 107 (2) (see below).

Where trustees permit a beneficiary, as such, to reside on trust property, he occupies it for the purpose of section 105 (*C. I. R.* v. *Miller* [1930] A.C. 222; *Tollemache* v. *C. I. R.* (1926) 11 T.C. 227). A surtax payer who permits a less wealthy relative to occupy a house of his rent-free may meet with reluctance on the part of the Inland Revenue to treat the relative as the occupier within section 105, since the effect is to exclude the Schedule A assessment from the owner's income. However, the claim is not ruled out. It was impliedly recognised by section 52 (2) of the Finance Act, 1948, dealing with Special Contribution.

There can be two occupiers at the same time, either jointly or separately (*Back* v. *Daniels* [1925] 1 K.B. 526; *Shanks* v. *C. I. R.* [1929] 1 K.B. 342). The Act does not specifically provide for apportionment of liability except where lands are divided into distinct occupations after the Schedule A assessment for the year has been made (s. 108).

Section 107 (2) (3) provides for "void relief" in the case of "houses" which are not occupied in fact (though they may be occupied in the *Bertram* v. *Wightman* sense). The relief is extended in practice to all buildings, to waste and unenclosed land, and also to agricultural land which the owner cannot let or farm himself.

There are a number of cases in which the "landlord" is to be assessed and charged but it will be convenient to discuss first section 105.

Right of Deduction: Long Lease

In 1940, to remove some of the anomalies of Schedule A (at the risk of creating new ones), Parliament arbitrarily divided leases and lettings into "long leases" and "short leases." A long lease, broadly speaking, is one for more than 50 years, not determinable by the lessor before the expiry of 50 years, and not determinable by a death or marriage (s. 172). Any other lease is a "short lease" (*ibid.*).

Rent under a long lease is treated in the same way as an annual payment under sections 169 and 170 (s. 177). The lessee is entitled to deduct tax at the standard rate from the rent and is accountable for this tax to the Revenue, unless he pays the rent out of fully taxed income.

Where the lessee mistakenly assumes that the lease is a short lease and consequently deducts less tax than he is entitled to, the mistake is one of fact and he can recover the overpayment from subsequent payments (*Turvey* v. *Dentons (1923), Ltd.* [1953] 1 Q.B. 218).

A landlord receiving rent under a long lease who is also assessed under Schedule A in respect of the same property, is allowed by concession to set off, against the Schedule A tax, the tax deducted from his rent.

Short Lease—Tenant-Occupier

Section 173 gives to a tenant-occupier under a short lease a right to deduct, from the rent, Schedule A tax assessed upon him but the right is hedged about by restrictions which may be summed up as follows:—

(1) He must have already paid the Schedule A tax (*Barnes* v. *Kyffin* [1916] W.N. 166).
(2) He cannot deduct more than the tax actually paid (s. 173 (1), second proviso).
(3) He must deduct from the *next* payment of rent (s. 173 (1); *Hill* v. *Kirschenstein* [1920] 3 K.B. 556).
(4) He must deduct from rent payable for the year in question (*Drughorn* v. *Moore* [1924] A.C. 53).
(5) He must not deduct more than tax at the standard rate on the yearly rent as reduced by allowances (other than repairs allowance) granted in arriving at the net annual value (s. 173 (1)).
(6) He must produce the Collector's receipt (s. 173 (1)).

S. 173: Consequences of the Restrictions on Deductions

These rules give rise to many hardships. They call for a great deal of circumspection from a tenant in his dealings with the Collector and with the landlord.

A tenant paying rent quarterly in advance whose lease expires on March 25, 1956, will be wise to pay the 1955/56 Schedule A tax well in advance; at the latest before he pays the final quarter's rent in December, 1955. Subject to any special stipulation in the lease he cannot deduct tax until he has paid it and if he does not pay it until the due date (January 1, 1956), there is no rent from which he can deduct it.

The requirement that tax be deducted from the next subsequent payment of rent dates from the days when the rate of tax was a matter of pence rather than shillings. Even with a letting at a rack-rent, the tax may well exceed a whole quarterly payment. Partial relief is granted by section 173 (3) under which three months' grace can be obtained from the Collector in respect of the amount by which the tax exceeds the next payment of rent. The occupier paying rent at monthly or weekly intervals will be in a worse case. His only remedy is to pay the tax in instalments long before it is due, each instalment equalling the next payment of rent. If the letting itself is for less than a year the landlord is assessed, but if he defaults the occupier is little better off (see *post*, p. 214).

A tenant who undertakes to carry out repairs or improvements instead of paying rent will find himself saddled with the Schedule A liability (*Drughorn* v. *Moore* [1924] A.C. 53). Moreover the net Schedule A assessment will be treated as his income for surtax purposes (*C. I. R.* v. *Fargus* (1926) 10 T.C. 665). It would be otherwise where he paid the estimated cost of the works to the landlord as rent, and stipulated that the landlord should carry them out.

In an old case where the landlord had distrained for the full rent, the tenant was held entitled to recover the deductible Schedule A tax from him by action (*Graham* v. *Tate* (1813) 1 M. & S. 609).

The restriction of the deduction to tax at standard rate ensures that the occupier himself suffers the tax on the excess of the net assessment over the rent. Such tax is said to be "ultimately borne" by him and is charged on the value of his "beneficial occupation," which as stated is deemed to be part of his total

income (*a*). If, however, the landlord is assessed, the tenant can have no beneficial occupation. The circumstances in which the landlord is to be assessed, instead of the occupier, are dealt with later in this article.

S. 174: Occupier as both "Owner" and "Tenant"

If the tenant-occupier under a short lease can show that he is also the "owner," his case falls within section 174, which provides similar, but not identical, rights of deduction. The section clearly contemplates that such a tenant can be the owner by virtue of his short lease and this possibility is emphasised by the decision in *Egyptian House Properties, Ltd.* v. *Maynards, Ltd.* [1934] Ch. 681 that the holder of a sublease for 28 years was an "owner" within the meaning of what is now section 174 (3) (see *ibid.*, p. 693). Equally clearly, section 173 contemplates that not all tenants under short leases are "owners," notwithstanding the wide scope of Schedule A. The precise point at which a tenant becomes an owner is not stated.

This confusion arises from the changes introduced by the Finance Act, 1940, and the way in which the draftsman has consolidated the law in sections 173 and 174 (*b*).

A convenient course would be to treat as an owner every occupier who ultimately bears all or any of the Schedule A tax, by reason of the net Schedule A assessment exceeding the rent. It is certainly the practice, in the granting of maintenance relief, to treat such persons as "owners" within section 101 (*cf. Pearce* v. *Doulton* [1947] 1 All E.R. 378; Income Tax Codification Committee Report, 1936, Cmd. 5131, p. 210).

What is to happen in a case which admittedly falls within both section 173 and section 174 is not clear. In relation to an occupier the differences in the rights of deduction granted by sections 173 and 174 respectively are not in fact great. Perhaps the most significant ones are that under section 174 the receipt need not be produced, and deductions may be made for a previous year provided the total deduction does not exceed tax at the standard rate in force when the respective payments fell due.

(*a*) Since the repairs allowance is not deductible from the rent in arriving at the amount on which tax at the standard rate is deductible a beneficial occupier always has the benefit of the repairs allowance, even though the landlord does the repairs (*Egyptian House Properties, Ltd.* v. *Maynards, Ltd.* [1934] Ch. 681).

(*b*) Another instance of confusion is the express limitation of the first proviso to s. 174 (1) to "a tenant or the occupier." Since the section is in any case confined to persons holding short leases, *i.e.*, to tenants, the limitation is superfluous.

Nevertheless, the inference which arises from section 174 as to the meaning of "owner" is of importance, particularly in relation to assessments on blocks of flats and the like, dealt with *post*, at p. 215.

Change of Occupier

Schedule A assessments are made early in the tax year, after the Finance Act has been passed, but the tax is not collectable until January 1. If, in the meantime, the assessed occupier has departed, the Collector may collect the tax from the occupier for the time being, without any new assessment (s. 106). Where there is a rapid succession of occupiers, the Collector may try each one in turn.

This power of collection does not extend to tax which "ought to have been levied upon and ultimately borne by any former occupier" (s. 106, proviso (c)).

The words "levied upon" appear to be synonymous with "collected from" in this context. Accordingly, if an owner-occupier, or a beneficial occupier, was in occupation until January 1 in a tax year, no subsequent occupier can be required, under section 106, to pay the tax. In practice, however, he may have no means of knowing how much, if any, of the tax ought to be borne by a previous occupier and in any case he may find it necessary to pay the tax in order to avoid distraint, as to which see *post*, p. 214.

A tenant-occupier who is required to pay tax under section 106 has the usual occupier's right to deduct tax from the rent under sections 173 and 174. Section 106 (b) extends the right as respects such part of the tax (if any) as ought to have been paid by a former tenant as occupier. The tax to which section 106 (b) applies may be deducted out of any subsequent payment of rent and without any restriction as to rate. Section 106 (b) apparently does not apply unless a previous tenant or occupier was in occupation when the tax in question was actually payable, not merely assessed. Moreover, in strictness, section 106 (b) does not apply to tax which fell to be ultimately borne by a former occupier, since a subsequent occupier cannot be validly required to pay it.

As a corollary to the above rules, an occupier who leaves is still liable to the tax for the period up to the date of leaving so far as such tax falls to be ultimately borne by him. In the case of sales by owner-occupiers, such tax is in practice allowed for in the apportionment account and the new owner-occupier pays the tax for the year.

Distraint for Arrears of Tax

An occupier taking over empty premises runs the risk of having his goods distrained on for tax for a previous period (s. 74 (7)). The Collector's power in this respect seems to be unfettered by the prohibition in section 106 (c) against " levying upon an occupier " tax which ought to be ultimately borne by a former occupier. The dictum to the contrary in *Reading* v. *Chew* (1898) 3 T.C. 625 (Bruce J. at page 626) is a doubtful authority. Section 110 (4) contemplates an occupier paying tax, which he is not legally liable to pay, in order to avoid distraint. When the Collector distrains he merely seizes goods on the premises, whether they belong to the present occupier, the former occupier or third parties.

It seems to follow that where the present occupier pays tax for a previous period to avoid distraint, then in so far as that tax falls to be ultimately borne by a previous occupier he has no rights of deduction from any rent he pays.

Assessment on Landlord

Assessment on the " landlord " is mandatory in the following cases:

(a) dwelling-house under £10 annual value (s. 109),

(b) " lands and tenements " let for less than one year (s. 109). A " weekly " tenancy expected to last 30 years is within this description (*Ellis & Sons Third Amalgamated Properties Ltd.* v. *Jackson* [1940] 4 All E.R. 409) but not, *e.g.*, a letting for 18 months, the rent being payable weekly,

(c) house or building let in different apartments or tenements and occupied by two or more persons severally (s. 109). The house is to be assessed as one unit (*ibid.*). As to the conflict between section 109 and section 113, see *post*, p. 216,

(d) house or tenement occupied by accredited Minister of a foreign State (s. 111).

In other cases the " landlord or immediate lessor " may elect in writing to be assessed, subject to the consent of the assessing commissioners (s. 110).

Apart from " assessment," section 80 gives the Revenue power to " recover," from the immediate lessor, Schedule A tax up to a maximum of the standard rate on the rent payable to the immediate lessor under a " short lease." As to the meaning of " short lease," see *ante*, p. 209. They are not bound to exercise this right if they can recover from the person actually assessed or from the occupier for the time being or by distraint.

Occupier's Liability on Landlord's Default

The occupying tenant of a dwelling-house under £10 annual value or under a letting for not more than a year is little better off than other tenants. Although the landlord is assessed, on the landlord's default the tax may be levied on the occupier (s. 109 (5)) who may deduct it from the next payment of rent (s. 109 (6)). There is no restriction to tax at the standard rate, but, as already explained, the tax may greatly exceed the next payment of rent. The tenant appears to have no means of recovering the excess from the landlord, although in practice the latter normally allows deduction from subsequent payments. The three months' grace provided for by section 173 (3) does not apply to deductions under section 109 (6).

Default by the landlord assessed under s. 109 (1) (c) (apartment or tenement house) does not have such serious consequences for the individual tenants. The Collector can require them to contribute towards the tax but no tenant need pay more than his next rent payment (7th Sched., para. 1 (1) (b)) and his right of deduction extends not only to that rent payment but all subsequent payments (*ibid.* para. 3). Again there is no restriction to tax at the standard rate.

It will be seen that the tenant-occupier of a flat or suite of offices is in a favourable position compared with tenant-occupiers in general. In the normal course he is not troubled about the Schedule A tax and even if the landlord defaults he can recover all the tax he is required to pay. All these advantages are lost however if he is treated as the " owner " of his flat or suite and is assessed in respect of it under section 113.

Where the defaulting landlord has been assessed because he so elected, under section 110, there is no provision for collecting the tax from the occupier as such. However, the right to distrain on the premises is preserved by section 110 (3). Section 110 (4) cynically assumes that the occupier may well pay the tax rather than suffer distraint; it permits him in those circumstances to deduct the tax from any subsequent payment of rent. Without such a provision (assuming that the lease is silent on the point) the occupier would seemingly have no right of deduction at all.

It should be added (although it is implied in what has been said so far) that a person who pays Schedule A tax, not in any of the ways provided for by the Act but gratuitously, has no right of recovering from the person who ought to have paid it (*Re Piccadilly Theatre (1928) Ltd.* (1935) 14 A.T.C. 12).

Landlord's Right to Deduct

A landlord may himself be liable to pay sums charged on the property. Rents under long leases and the other annual payments described in section 177 are subject to the ordinary rules of deduction in sections 169 and 170 already referred to.

Deductions from rent under a short lease are governed by section 174 which applies to such rents paid by a " landlord, owner or proprietor." The meaning of " owner " and the position of an occupier have already been discussed (*ante*, p. 211). The landlord's right to deduct is expressed to arise if either (a) he has been " charged " to tax under Schedule A; or (b) tax is deductible from him under either section 173 or section 174. The section is so worded that he must in either case have actually paid (directly or by deduction) the tax he seeks to deduct, and he must have paid it because he was required to pay it (*Re Piccadilly Theatre (1928) Ltd.* (1935) 14 A.T.C. 12). The extent of the right is the same as for an occupier under section 174 as already explained.

A landlord may have his own hardships under section 174. Assume he makes his last payment of rent in full on the due date June 24, 1955. On July 1, 1955, he receives rent from his sublessees less the 1954–55 Schedule A tax. He cannot recover the tax from the head-lessor, nor could he have deducted it on June 24, 1955, since he had not then paid it (*British Photomaton Trading Co., Ltd.* v. *Henry Playfair, Ltd.* [1933] 2 K.B. 508).

It seems that the landlord would have no right to pass on deductions made under sections 106 (b), 110 (4) or the 7th Schedule, Part III, paragraph 3, if they referred to a period before he became landlord. In the absence of any stipulation about them in the contract of purchase, he would have no remedy against the vendor. Again, the recovery by a collector from a lessor of tax at the standard rate on rent payable to him (s. 80), confers on the lessor no additional right of deduction from any rent he himself pays (*Thorley* v. *Payne* [1943] K.B. 306). This can cause hardship where the tax relates to a period prior to his becoming lessor.

Building with Several Distinct Occupiers

Difficulties arise in relation to blocks of flats or offices, and to houses which have been " converted." The relevant words of section 109, already referred to, are as follows:

" (1) The assessment and charge under Schedule A shall be made upon the landlord in respect of . . .

" (c) any house or building let in different apartments or tenements and occupied by two or more persons severally, and

> any house or building let in different apartments or tenements and occupied by two or more persons severally shall be assessed and charged as one entire house or tenement."

But for the subsection each separate apartment would constitute a separate unit of assessment. Presumably those parts of the building such as the staircase, which were not let to any individual tenant but available for common use, would also constitute a unit of assessment, of which the landlord could be assessed as occupier. However, their value would be very small and the Revenue would probably be content with assessments on the apartments as such. Where section 109 (1) (c) applies, the practice is to treat all the flats, etc., sharing a common entrance from the street as constituting one unit of assessment (*Embleton* v. *The Norwich Union Life Insurance Society* (1927) 11 T.C. 686; *Towle* v. *Improved Industrial Dwellings Co., Ltd.* [1931] 1 K.B. 263).

The question arises as to the extent of which the scope of section 109 (1) (c) is cut down by an even older provision of the Income Tax Acts which now appears as section 113 as follows:

> " Where a house is divided into distinct properties and occupied by distinct owners, or their respective tenants, such properties shall be separately assessed and charged under Schedule A on the respective occupiers thereof."

The two provisions can overlap only if the person to whom an apartment, etc., is " let " within section 109 (1) is at the same time its " owner " within section 113. That the two things are not exclusive seems to be beyond doubt, at any rate since 1952 (*cf.* s. 174 discussed, *ante*, p. 211). The difficulty is to decide what circumstances are necessary to satisfy the requirements of section 113.

In the past the tendency has been to confine section 113 to buildings divided into separate (" flying ") freeholds. However, if " owner " in section 113 has the same meaning as it has in sections 101 and 174, it can include tenants holding under short leases and the convenient course would be to regard as an owner any such tenant whose rent was less than the annual value, *e.g.*, where he had paid a substantial premium for the lease.

Sections 109 (1) (c) and 113 closely resemble rules 6 and 14 respectively of Schedule B to the House Tax Act, 1808 (48 Geo. 3, c. 55), which were judicially construed in *Att.-Gen.* v. *Mutual Tontine Westminster Chambers Association* (1875) 10 Ex. 305; (1876) 1 Ex.D. 469. Jessel M.R. was of the opinion that the word " divided " in rule 14 did not import any structural division;

he regarded the words " separate properties " as meaning " separate ownerships."

On the other hand it was held that tenants under leases of up to 21 years were not " owners " within the rule. There is no mention of any premiums being paid however and it may well be that all the tenants paid full rack-rents. Moreover the word " owner " seems, for the reasons given above, to have a wider meaning for income tax than it had for the old inhabited house duty.

Flats let for substantial periods at a premium

Since the war the practice has grown of granting leases of flats at substantial premiums. The annual value adopted for Schedule A purposes will sooner or later reflect those premiums, since the assessing authorities are entitled to take them into account (*Davies* v. *Abbott* (1927) 11 T.C. 575) and it is the Revenue practice to apply this decision. Accordingly the rents paid may be considerably less than the Schedule A assessment. The question arises as to who is to bear this tax on the premium element. If the tenant of such a flat is the " owner," as he would seem to be, then a separate assessment should be made on each flat and each tenant will bear tax on his " beneficial occupation." If the tenants are not treated as owners, the landlord will be assessed and will bear all the tax, less what he can deduct from the rent he pays to the superior lessor. His expenditure may so greatly exceed the rent he receives that the premiums are exhausted before the leases expire.

The Revenue practice appears to have changed recently, their present practice being set out in a written answer given on July 2, 1954, by the Financial Secretary to the Treasury (H. of C. Official Reports, Vol. 529, pp. 133, 134). Where a substantial premium is paid and the lease is for a long period sections 105 and 113 will be applied. " Long period " in this context presumably includes to periods of less than 50 years. In deciding whether or not a person is an " owner " the question whether his lease is for a little or less than 50 years seems to be immaterial.

Power to Increase Assessments

In general, Schedule A assessments can be increased only in a revaluation year, since section 84 (3) provides that " the annual value of any property which has been adopted for the purpose of income tax . . . for any year . . . shall be taken as being the annual value of that property . . . for the next year . . . unless that year is a revaluation year." The normal practice is to increase assessments in continuation years where, but only where,

there have been structural alterations (*Thornley* v. *Brown* (1929) 15 T.C. 459; *Lyons* v. *Collins* [1937] 1 K.B. 353). The only authority for this is a dictum of Channel J. in *Turner* v. *Carlton* [1909] 1 K.B. 532 to the effect that a " real change " in the property would produce a different property. However, for a year in which a block of flats ceases to be a unit of assessment, separate assessments being made on each flat, it follows that section 84 (3) has no application and it will be open to the Inland Revenue to increase assessments before the general revaluation, even where structural alterations are absent.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Simmons v. *Pennington & Son* [1955] 1 W.L.R. 183; [1955] 1 All E.R. 240 (C.A.)

Sale of land—misdescription—restrictive covenants—condition—replies to requisitions on title—whether negligence by solicitors.—This was an action for negligence against solicitors. The plaintiff sold by auction property for many years used and known to all concerned as business premises but in fact subject, at any rate on paper, to covenants imposed in 1870 restricting user to a private dwelling-house only. The particulars of sale described the property as "valuable and commanding freehold corner and shop premises"; a special condition (No. 7) provided that the property was sold subject to the covenants of 1870 (without setting them out), that the deed was available for inspection and that in any event the purchaser should be deemed to take with notice thereof. In reply to the common form requisition asking if there were restrictive covenants and, if so, whether these had been observed the defendants said: "Yes. See special Condition 7. There appear to have been breaches as to user but no notice of breach has been served." In 1951 the Court of Appeal held (unreported, unfortunately) this reply to amount to an assertion that the covenant was effective, so that the vendor could not make title to the property described. Consequently the purchaser obtained rescission. In the present action the Court of Appeal (Denning, Hodson and Parker L.JJ.), affirming Harman J., held that the reply, being in common form, was not negligent but within "the reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor" (*per* Denning L.J. [1955] 1 W.L.R., at p. 187; [1955] 1 All E.R., at p. 243), especially as experienced counsel advised an appeal in the 1951 action (see *per* Hodson L.J., citing from Harman J. in the court below [1955] 1 W.L.R., at p. 188; [1955] 1 All E.R., at p. 245). Their Lordships pointed out that the defendants could not safely have said the covenants were obsolete, as that would have committed the vendor to a warranty; a neutral non-committal reply was needed.

The real difficulty, it is submitted, arose not so much from the reply to the requisition as from the original description in the particulars of sale (which was not negligent—[1955] 1 W.L.R., at p. 189; [1955] 1 All E.R., at p. 245). A vendor must make title to what he purports to sell; if he cannot, a general reference to restrictions, as here, does not appear to be adequate disclosure. ". . . where a vendor inserts a condition [concerning] . . . any particular matter

which the vendor knows about but the purchaser does not, it is his duty to make full disclosure of such matters so as to enable the purchaser to consider and determine whether it is worth his while to accept such defective title" (Emmet on *Title,* 13th ed., Vol. I, at p. 105). Thus where a lease restricts business use, wholly or substantially, a vendor cannot make enforceable a contract for the sale of "business premises," by inserting a condition putting the purchaser on merely general notice of the lease (*Re Davis and Cavey* (1888) 40 Ch.D. 601; *Charles Hunt Ltd.* v. *Palmer* [1931] 2 Ch. 287) and the law concerning restrictive covenants seems to be the same (see George, *Sale of Land,* p. 56; Key & Elphinstone, 15th ed., pp. 337, 427). In circumstances such as those in the instant case a prospective vendor may find it necessary to make application for modification or discharge of the covenants under the Law of Property Act, 1925, s. 84.

Re Ellenborough Park, Re Davies, Powell and Others v. *Maddison and Another* [1955] 2 All E.R. 38 (Ch.D.)

Easement—right to enjoy park—jus spatiandi—subject-matter of grant—validity.—An easement can confer only a limited and certain right—it must be "capable of being the subject-matter of a grant." This is more than the requirement of sufficient certainty for enforcement, for that applies equally to covenants with their wider range (*National Trust* v. *Midlands Electricity Board* [1952] Ch. 380). In the present case Danckwerts J. had to construe a grant, duly annexed to a dominant tenement, of "full enjoyment . . . of the pleasure ground . . . called Ellenborough Park." The learned judge in a considered judgment reviewed the leading cases on the nature of easements, and held that the interest claimed, though a *jus spatiandi,* was nevertheless a valid legal easement. In particular he rejected the well-known dicta by Fry J., denying the *jus spatiandi* the status of an easement, in *International Tea Stores* v. *Hobbs* [1903] 2 Ch. 165, at p. 172, and *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, at p. 198, and held himself bound by *Duncan* v. *Louch* (1845) 6 Q.B. 904 and *Keith* v. *Twentieth-Century Club* (1904) 73 L.J.Ch. 545. In the former case a right to wander at large on a terrace was regarded as an easement, while in the latter, though the point was not taken, a deed conferring a right to use gardens was construed and regarded as valid. Both Gale (12th ed., p. 23, note (c)) and Key & Elphinstone (15th ed., Vol. I at p. 998, note (1)) accept *Keith's* case.

It is suggested, with respect, that despite the undoubtedly indecisive state of the earlier authorities, the present decision will be received with some surprise, because it seems to run counter to the general tenor of the decisions on easements since the tightening-up process which began with *Keppel* v. *Bailey* (1834) 2 My. & K. 517 and *Hill* v. *Tupper* (1863) 2 H. & C. 121. Again, there does not seem to be much difference between a claim to "joint user," rejected in *Copeland* v. *Greenhalf* [1952] Ch. 488, and a *jus spatiandi,* unless there be force in the suggestion there, and in *Dyce* v. *Hay* (1852) Macq. 305, that express grants can have a wider range than prescriptive claims.

The decision could have considerable practical effect if open spaces can be preserved by means of easements of enjoyment rather than restrictive covenants; the former, apart from being legal and not equitable interests, are not liable to modification or discharge under the Law of Property Act, 1925, s. 84.

The claimants here were also successful in obtaining a share in compensation received under the Compensation (Defence) Act, 1939, and in requiring sums paid for damage to be applied in reinstatement, having conceded liability to repair as provided in the grant.

Hopgood v. *Brown* [1955] 1 W.L.R. 213; [1955] 1 All E.R. 550 (C.A.)

Sale of land—parcels—plan—encroachment—estoppel—effect on successors in title—mutual licences—revocation.—Several interesting matters of law and practice were here discussed. In 1932 adjoining north and south plots were conveyed to T. by separate conveyances. In each a verbal description gave measurements of external boundaries, but the common boundary, not marked on the ground, was shown only as a straight line on a small plan introduced by the words "for the purpose of facilitating identification only." These parcels were repeated in all subsequent conveyances. In 1951, after further conveyances the defendant, then owner of the south plot, employed W. & B. Ltd., then owners of the north plot, to build him a bungalow and garage; these buildings and a fence "encroached" two or three feet to the north so as to make the physical boundary an obtuse angle. At the same time a drain was put in running from the south plot to the north and, serving both plots, back under the south to the road. In 1952 the plaintiff, a subsequent purchaser of the north plot, erected a bungalow and then found that the encroachment prevented his getting a car through to the rear of his plot. He sued for a declaration as to the boundary, damages, and for trespass or nuisance in respect of the drain.

The Court of Appeal (Sir Raymond Evershed M.R., Jenkins and Morris L.JJ.) held that in 1932 the common boundary was the straight line on the plan, because otherwise there was no certainty in the parcels; moreover (Evershed M.R. *dubitante*) the same construction had to be applied to the same description in the subsequent conveyances. The principle here is that the court must seek a clear and unambiguous description (*Eastwood* v. *Ashton* [1915] A.C. 900; *Wallington* v. *Townsend* [1939] 2 All E.R. 225); the instant decision shows that qualifying words will not prevent reliance on a plan if no other description is adequate.

Consequently the buildings encroached. The court held however that W. & B. Ltd. were by their conduct estopped from disputing the physical boundary (citing Spencer Bower on *Estoppel by Representation*, at p. 9, and *Cairncross* v. *Lorimer* (1860) 1 L.T. 130) and further that this estoppel bound the plaintiff on the authority of *Taylor* v. *Needham* (1810) 2 Taunt. 278 (a case on landlord and tenant) where Mansfield C.J. said "parties and privies are estopped and he who takes

an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it." Though this principle is stated in general terms (*cf.* Co.Litt. 353a and Spencer Bower, *op. cit.*, at p. 145) its application outside the relationship of landlord and tenant is obscure (see cases cited in Spencer Bower, *op. cit.*, at p. 157). The present decision seems to break fresh ground. Once estoppels run with the land the boundary between evidence and property is reached and crossed, for facts like the present give rise to constructive grants or executed licences. It is respectfully submitted that such equitable interests, whatever their basis, can only be enforced against successors in title within the limits of the doctrine of notice, including, after 1925, the requirement of registration where relevant (see Gale on *Easements*, 12th ed., p. 59; 16 *Conveyancer* (N.S.), pp. 328–330; *Gresham Life Assurance* v. *Crowther* [1914] 2 Ch. 219; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466). If the title is registered the question of overriding interests also has to be considered.

As to the drain, the court held that the arrangement created mutual licences which the plaintiff personally was prevented from revoking so long as he enjoyed the benefit thereof (*cf. Pyer* v. *Carter* (1857) 1 H. & N. 916).

Apart from the law involved, this case is a reminder of the problems liable to arise in any transaction if physical dealings with the land are not recorded on the title, especially if the plots are small (*e.g., Bellotti* v. *Chequers Development Co.* [1936] 1 All E.R. 89). As a safeguard someone should always check the parcels clause against the actual land. If no surveyor is being employed it would seem that solicitors will frequently have to ask the client to do this.

Mason and Others v. *Clarke* [1955] 2 W.L.R. 853; [1955] 1 All E.R. 914 (H.L.)

Profit à prendre—oral grant—possession—action for trespass—derogation from grant.—The facts (given more fully in Vol. 18, p. 76) were that B. & Co. leased farmland to the defendant, reserving the sporting rights, and later gave the rabbiting rights to the plaintiff for one year by an oral agreement. The defendant gassed rabbits. The House of Lords agreed with the Court of Appeal that, in the absence of a deed, the plaintiff had no legal *profit à prendre*, but differed in holding that there was no taint of fraud or illegality on the facts, so that he acquired a good equitable interest. Consequently he could sue in trespass for interference to his possession of the profit (following *Fitzgerald* v. *Firbank* [1897] 2 Ch. 96). The effect of the Judicature Act, 1873, is here illustrated because on almost precisely similar facts an opposite conclusion was reached by a court of common law in *Duke of Somerset* v. *Fogwell* (1826) B. & C. 875. Their Lordships here were not agreed whether title as well as possession had to be proved; it is submitted, with respect, that if the landowner is the defendant the plaintiff must prove at least that the profit has been separated from the land. It was further held, again reversing the Court of Appeal, that removal of the plaintiff's snares was a derogation from grant (explaining *Peech* v. *Best* [1931] 1 K.B. 1).

In both Court of Appeal and House of Lords this case proceeded on the basis that B. & Co. acquired a legal *profit à prendre* by the original reservation. Yet that was contained in a tenancy agreement *under hand only* (see *per* Denning L.J. [1954] 1 Q.B. at p. 466). The result seems to be (1) a *profit à prendre* or easement (for the law is always regarded as being the same), if created by itself, must be by deed but (2) can be validly created (by grant or reservation) in any lease which is itself valid without a deed (Law of Property Act, 1925, ss. 52, 54). The same rule seems to hold for implied grants (*Wright* v. *Macadam* [1949] 2 K.B. 744). There has, it is submitted, been established a convenient exception to the general principle that easements and *profits à prendre* must be created by deed.

Morelle Ltd. v. *Wakeling* [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708 (C.A.)

Registration of title—foreign company without power to hold land—form of registered disposition—forfeiture—action for rent—Mortmain and Charitable Uses Act, 1888, *s.* 1—*Land Registration Act,* 1925, *ss.* 23, 80.—Here a full Court of Appeal (Sir Raymond Evershed M.R., Denning, Jenkins, Morris and Romer L.JJ.), having refused to find *Morelle Ltd.* v. *Waterworth* [1955] 1 Q.B. 1 (noted in Vol. 18, p. 420) decided *per incuriam,* considered whether the plaintiffs, as registered proprietors under the Land Registration Act, 1925, could sue for rent despite their lack of a licence in mortmain or statutory authority to hold land. Though here leasehold land held under a possessory title was involved, the court regarded the law as equally applicable to freehold or leasehold land, and all types of registered title.

The Act preserves the Crown's right to forfeiture subject to the effect of first registration or disposition for value (s. 80). Registration of such a disposition vests in the transferee the estate transferred, subject to overriding interests, interests protected on the register and, if leasehold, implied obligations, but free from all other estates and interests including those of the Crown; the transfer operates, subject to any entry on the register, as if the transferor were entitled to the estate for his own benefit (ss. 20, 23). The Master of the Rolls, delivering the judgment of the court, said: "These provisions [ss. 20, 23] are designed to protect a purchasing transferee from defects in the transferor's title . . . and not to relieve such a transferee from a defect in the transferee's own title such as forfeiture"([1955] 1 W.L.R., at p. 690; [1955] 1 All E.R., at p. 721). The same result followed even if there was a prior forfeiture by the vendor on the execution of the transfer. A purchaser could therefore take free from the forfeiture; emphasis is placed on the words relating to the transferor's title rather than those vesting an estate in the transferee. The Master of the Rolls added—necessarily *obiter*—that first registration would cure a prior forfeiture occasioned by the ordinary unregistered conveyance. The "vesting" words of the first registration sections (ss. 5–12) are so similar to those of the disposition sections (ss. 20,

23) that it is perhaps a little surprising to find them given such a radically different effect.

The court also held that the Registrar's discretion as to the form of documents (L.R.R. 74, 322) was sufficiently wide to make acceptance of any document for registration conclusive as to point of form. Departure here from Form 35 (L.R.R. 121) by omission of any reference to a licence in mortmain was therefore irrelevant. This part of the decision is most welcome because the prescribed forms are often inadequate, and the system of registered conveyancing only works because the Registrar permits practitioners to adapt them to the needs of the actual transaction.

The implications of the present decision are somewhat uncertain. At one stage ([1955] 2 W.L.R., at p. 693; [1955] 1 All E.R., at p. 723) the Master of the Rolls said it turned "simply on the absence in section 23 of any express provision to oust the Crown's right of forfeiture contained in section 80." It may well, however, sustain the general proposition that any action by a registered proprietor can be challenged on the ground of his personal incapacity, *e.g.*, if an infant registered proprietor sought to enforce restrictive covenants. Powers of disposition (ss. 18, 21) are then exceptions to this rule, but would express or constructive notice of incapacity in the registered proprietor be a relevant matter in, for example, a vendor and purchaser summons or proceedings to rectify the register? A confident answer can hardly be given either way. The trouble is that, once any sort of gap is made in a statutory "curtain" scheme of conveyancing, it is difficult to know where the process will stop. Leave to appeal was here given and one cannot help feeling that the interests of registered conveyancing generally would be served if the House of Lords found itself able to accept the argument that registration is effective for all purposes until and unless the register is rectified. However, the decisive consideration is, of course, not convenience but the proper construction of the words of the Act.

(See the article on p. 190, *ante*.)

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Grotrian, Cox v. *Grotrian and Others* [1955] 2 W.L.R. 695; [1955] 1 All E.R. 788 (Ch.D.)

Condition — termination of war — construction—perpetuity. — A testator who died in 1939 gave property to his son absolutely "when the present war with Germany shall terminate and peace be declared." Danckwerts J. held (1) the condition was fulfilled on July 9, 1951, when the formal state of war with Germany was terminated by proclamation, for in this context absence of war meant the existence of peace; (2) the gift was intended to take effect only if the condition happened in the son's lifetime, so that the Rule against Perpetuities

was not infringed (*cf. Re Wood* [1894] 3 Ch. 381—gift on exhaustion of gravel pits invalid).

On the first point, it may be noted that leases for the "duration of the war," could be terminated, under the Validation of War-Time Leases Act, 1944, after dates in 1945 (see Emmet on *Title*, 13th ed., Vol. II, at pp. 750, 751). Presumably the present decision would be followed in any other cases concerning settlements or wills.

Walter & Sullivan Ltd. v. *J. Murphy Ltd.* [1955] 2 W.L.R. 919; [1955] 1 All E.R. 843 (C.A.)

Chose in Action—debt—equitable assignment of part—action by assignor—joinder of assignee.—An assignment of part of a debt, whether or not by way of charge, is an equitable assignment to which section 136 of the Law of Property Act, 1925, does not apply. In *Re Steel Wing Co. Ltd.* [1921] 1 Ch. 349 Lawrence J. held that an assignee of such part must join the assignor in any action because otherwise the court could not adjudicate completely and finally. This rule now extends to an action by the assignor who must join the assignee. Here an assignor of part of a debt, by way of charge, later sued alone to recover the whole. The defendants had notice of the assignment. The Court of Appeal (Hodson and Parker L.JJ.) in a single reserved judgment held the plaintiff's claim to be an "impossible contention. The whole object of the notice to the debtor is to protect the assignee" (*per* Parker L.J. at [1955] 2 W.L.R., at p. 921; [1955] 1 All E.R., at p. 845). The court would not give judgment while an admitted interest was outstanding. As to procedure, see generally R.S.C., Ord. 16, r. 11, Ord. 57, r. 1, and *Maatschappij voor Fondsenbezeit* v. *Shell Transport Trading Co.* [1923] 2 K.B. 166.

Re Longman, Westminster Bank Ltd. v. *Hatton* [1955] 1 W.L.R. 197; [1955] 1 All E.R. 455 (Ch.D.)

Protective trust—authority to pay to creditor out of specified dividend — dividend subsequently passed — no forfeiture.—The forfeiture words of protective trusts are necessarily cast in hypothetical terms—the subjunctive "would or might"—because they have to prevent any income actually passing to assignees or creditors. Difficulty is thereby caused where a prospectively forfeiting event does not actually come into operation on the income. In general, the courts have been reluctant to hold that forfeiture has occurred unless some sum would actually have been payable to the assignee etc. (see *Re Mair* [1909] 2 Ch. 280; *Re Forder* [1927] 2 Ch. 291; *Re Salting* [1932] 2 Ch. 57; *contra Re Baker* [1904] 1 Ch. 157). In the present case the beneficiary directed payment to a creditor out of a specified prospective dividend which was, however, passed by the company. Danckwerts J. held that no forfeiture was incurred.

In these cases the relevant words have been, in effect, "would or might become vested or payable." The Trustee Act, 1925, s. 33, says

" would be deprived of the right to receive the same or any part thereof "—words which might well have a wider ambit.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

I. R. C. v. *Baddeley* [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525

Fourth class of charity — social intercourse — public benefit.— Harman J. had held that a gift which extended to social well-being as well as religious and physical well-being was not strictly charitable (17 *Conveyancer* 87). The Court of Appeal, possibly pressed by the problem which might be created for the playing-field trusts, diverged from what was generally expected and upheld these trusts for well-being as charitable (17 *Conveyancer* 311 *et seq.*). They held that education was wide enough to cover social graces and that the Methodist Church was a public group.

The House of Lords have turned their backs on this " Cakes and Ale " interpretation of charity and restored the law to the state in which, with respect, it had generally been understood before the decision of the Court of Appeal. The trust failed for uncertainty. This decision is likely to be a leading case for some time to come.

Their Lordships held that the trusts in this case were not exclusively religious, as was indeed the inevitable effect of *Farley* v. *Westminster Bank Ltd.* [1939] A.C. 430 (" parish work "), a decision binding on the House. It was as little to be regarded as exclusively educational. In a sense, it was pointed out, all experience is educational, but the promotion of interesting experiences can hardly be regarded as strictly charitable.

Treating the trusts as in effect intended to provide a social community centre (Viscount Simonds, at p. 557; Lord Somervell, at p. 583) they decided it lacked a sufficient public element to qualify under the fourth rather amorphous class of charitable trusts. *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447 was held to be a binding authority in point, with its social club for Welshmen. Here we come to the crux of the decision. Lord Reid, in a dissenting judgment, found it difficult to say that a trust for Methodism is a good religious charity, as it undoubtedly is, whereas a club for Methodists lacked a public element. The majority of the court, however, supplied a valuable test to distinguish the two cases. *Will the trust benefit all those who might benefit from it?* (p. 582). A Roman Catholic, one might imagine, would have no desire to attend a Methodist service. Hence there is sufficient public element in a service limited to Methodists. But, as the court said, the provision of a bridge which only Methodists might cross would lack a public element, if it connected two places where non-Methodists lived. A gift for infants aged three from time to time would be a good charity as it would apply to all three-year old

persons, although these form a small fraction of the general public. It would be suited to their special needs. But a social centre would be an amenity for any persons, of any creeds. A gift to Methodists in certain districts of East London was therefore held to lack sufficient public benefit. Admittedly the line might be difficult to draw in many cases.

The House reassured the Attorney-General that it was not in any way prejudging the question of trusts for playing fields and hinted that, if these were open to the general public and not restricted to sects or private groups (*e.g.*, employees of a business), they might be charitable.

(Theobald 347.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Burton's Settlement Trusts [1955] 2 W.L.R. 452; [1955] 1 All E.R. 433

Will or settlement—construction—rule in Lassence v. *Tierney.*—The Court of Appeal have reversed Roxburgh J. (see 18 *Conveyancer* 619) and re-established the applicability of the Rule in *Lassence* v. *Tierney*. This is, with respect, very helpful, as the decision in the court below threw the law into considerable uncertainty. The idea that the initial division of the property into two shares for the two daughters was administrative only was rejected by the Court of Appeal. This left a classic situation for the application of the rule. The provision adopted, to prevent vesting in the daughters absolutely, implied that it would otherwise so have vested. It was considered that the settlor would have intended their estates to benefit rather than imply a resulting trust. A gift over on failure of their issue would have shown an intention the other way, but there was no such gift over. In the event the estates of the two daughters took. As one had left her property to the other everything went to the surviving daughter, and, as she died a spinster, would be dealt with as her estate.

There is an interesting point (p. 460) that the court may be more willing to imply a resulting trust in a settlement than in a will, as there is no leaning against intestacy involved in the case of a settlement.

(Theobald 403, 404.)

Re Follett [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22

Will—accidental omission—uncertainty as to words intended to be inserted (see 19 *Conveyancer* 68 for decision at first instance).—

The Court of Appeal have reversed the decision of Roxburgh J. on the facts of this case. All three members of the court were dubious as to the theory that the draftsman in this case used a particular precedent from *K. & E.* Although there were some similarities in language there were other differences, quite apart from the obvious blunder which led to this dispute. This destroyed the basis of the decision below. Once it was absolutely unclear what the draftsman intended to insert, the court had no jurisdiction to act on a surmise. The court was therefore left with the wording of the will as it stood, which meant that the power was merely a general power, however unusual its formulation, which referred to several groups of special objects within what was held to be a general power under the final clause.

(Theobald 642.)

Re Hutchinson [1955] 1 Ch. 255; [1955] 2 W.L.R. 586; [1955] 1 All E.R. 689

Intestacy—widow's claim to personal chattels—"hobby horses." —There have been several decisions as to the meaning of "personal chattels" as an expression used in a will, and under section 55 (1) (x) and section 46 of the Administration of Estates Act, 1925, where a widow claims all personal chattels on the intestacy of her husband. Section 55 specifically refers to "horses" provided they were not used for business purposes. In the instant case the deceased ran a stud farm as a business but he also raced horses and owned 12 racehorses at his death. The statement of facts is not very full in the judgment. The horses fetched over £7,000 but they were probably not kept for sale. Whether they ever won enough prize money to pay for their upkeep is not stated. Possibly the court took judicial notice of the fact that horse racing is an expensive hobby for the owner and not a profitable business. The rest of the judgment followed from this. There was no other reason to exclude these 12 racehorses from the clear reference to horses in section 55. The nearest case would seem to be *Re Ogilby* [1942] Ch. 288 where cattle on a farm were held to be used for business purposes though the farm was a "hobby" of the owner. The decision in that case seems to have turned on one of two points or both, that the keeping of the herd of shorthorn cattle could not be separated from the rest of the operations of the farm, or that farming was necessarily a business. In the instant case there were separate accounts for the stud farm, and the racing of horses is probably regarded as a sport and not a business. Still, Danckwerts J. might well have gone beyond the reference to "horses" and distinguished the instant case from *Re Ogilby*.

(Williams on Executors, para. 1450.)

Re Martin [1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865

Order of application of assets of solvent estate—Administration of Estates Act, s. 34—variation.—Cases on the order of application of

assets are always interesting, even when the report, as in this case, is rather short. A testator bequeathed his residuary personalty to be used to pay his debts. He devised his real estate to his daughter Kathleen but later executed a codicil revoking this devise, so that the real estate went on intestacy. The question was how debts and legacies were to be paid.

Danckwerts J. found a direct solution to the problem of legacies by referring to the order contained in Sched. I, Part II, which in the first instance says that debts are to be paid out of " Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." There was nothing in the will to vary this provision; consequently all legacies were to be paid in the first instance out of the real estate passing on intestacy. *Re Thompson* [1936] Ch. 676 was referred to, but that was a case where both real and personal property had been left in residuary gifts and it was held that legacies were primarily payable out of personalty, so far as it went. The instant decision appears to be in conflict with that in *Re Beaumont* [1950] Ch. 462 where legacies were held not to fall primarily on a lapsed share of residue, where residue was divided among four persons, one of whom predeceased the testatrix, as the order of application laid down in the Schedule was inapplicable in the case of legacies. The division of lapsed gifts was necessary because legacies might have to abate to meet debts, but the same problem does not arise where the order of payment of legacies is itself in question. Whether the order in the Schedule applies to legacies as well as debts is disputed by textbook writers.

Debts were considered to fall on the personalty specifically bequeathed to pay debts, although this comes lower in the list than undisposed of property. It is not stated that the testator went so far as to exonerate realty which lapsed from such a charge, and on the facts it is unlikely (see *Re James* [1947] Ch. 256).

(Williams on Executors 980, 988.)

Re Aldhous [1955] 1 W.L.R. 459; [1955] 2 All E.R. 80

Protection of personal representatives—right of claimant to proceed against wrong payee—Trustee Act, 1925, *s.* 27.—This decision of Danckwerts J. deals with two interesting points. A testator made a will and appointed an executor but made no disposition of his estate except for a small legacy, so that it fell to be administered under the law of intestacy. The executor advertised for claims " against the estate." Receiving no such claims he treated the property as passing as *bona vacantia* to the Crown under section 46 (1) (vi) of the Administration of Estates Act, 1925, and paid the proceeds of the assets to the Treasury Solicitor who accounted for them to the Crown. A niece of the testator later claimed to succeed to the estate.

(1) The learned judge held that the estate had been fully administered and that there was no jurisdiction at this stage to make a further grant of administration *de bonis non.* The executor could plead *plene administravit,* owing to his statutory protection under section 27 of the Trustee Act, 1925. The fact that the wrong person

may have got the estate did not affect the executor, thanks to that section. Otherwise the recent decision in *Harvell* v. *Foster* [1954] 2 Q.B. 367 would have applied.

What could the niece do to substantiate her claim? In fact, in this case, the Treasury Solicitor was willing to repay her what she had lost, if investigation proved her relationship. It was too late to trace the property, since it had passed into the Consolidated Fund. Danckwerts J. suggested *obiter* that the niece might otherwise have had no claim, but no authority was cited for this proposition. It is admitted that the protection of section 27 of the Trustee Act does not enure for the benefit of the wrongful recipient of the money. That there is a personal action against such a recipient in the case of payments under mistake of fact, as in the instant case, appears clearly from *Minister of Health* v. *Simpson* [1951] A.C. 251, at pp. 268, 276, where the doctrine was extended to mistakes of law. A Petition of Right would appear to have lain in the past for any civil cause of action (*cf. Att.-Gen.* v. *De Keyser's Royal Hotel* [1920] A.C. 508). Hence an action would lie against the Crown, it is submitted, under section 1 of the Crown Proceedings Act, 1947, and the court could also make a declaration as to property under section 21 (1) (b) of that statute.

(2) The Trustee Act, 1925, s. 27 does not provide a standard form of notice and it is well known that the law on this subject is rather vague. The section refers to advertisement so that *persons interested* may give particulars of their claims *in respect of the property,* and specifically refers to persons beneficially entitled to the property. The form of words used by the executor in this case suggested external debts and liabilities rather than internal distribution of assets beneficially. The definition section of the Trustee Act (s. 68 (11)) defines "property" as "any real or personal property *and any debt.*" Hence the section refers to beneficial claimants and creditors, though in a rather roundabout and unsatisfactory way. It was held, however, that the notice was sufficient for the purpose, and, no doubt, was enough to put all types of claimant on notice in practice.

(Williams on Executors (13th ed.) paras. 1164, 1888.)

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5. *PLANNING CASE*

By T. A. Blanco White, Barrister-at-Law

John v. *Reveille Newspapers Ltd.* (1955) 5 P. & C.R. 95

Advertisement—display without consent—display by billposter.—This was an appeal by case stated to the Divisional Court from a decision by justices dismissing an information alleging unlawful display of an advertising poster. The offending poster was one of a batch put up by a billposter under a contract which provided for the billposter's finding the sites and the advertisers' paying an agreed sum per hundred for the job. The justices held, no doubt rightly, that the billposter was not a servant or agent of the advertiser but an independent contractor; and on this finding the Divisional Court

dismissed the appeal. Section 32 (4) of the Town and Country Planning Act, 1954, under which any advertiser is prima facie deemed to display any advertisement relating to his business, did not apply, for the offending site was chosen without this advertiser's knowledge or consent.

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6. *LANDLORD AND TENANT*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Haymills Houses Ltd. v. *Blake* [1955] 1 W.L.R. 237; [1955] 1 All E.R. 592

Rent Restrictions Acts—order for possession—arrears of rent—conditional order—condition not complied with—subsequent order extending time for compliance and discharging original order on compliance.—This is a decision on the interpretation and application of section 5 (2) of the 1920 Act as amended by section 4 (2) of the 1923 Act. The facts were that, in an arrears of rent case, a conditional order for possession had been made, *i.e.*, an order for possession by a certain date unless the arrears and costs had been paid in the meantime. The payments were not made by the date stated, so that the order became operative; in other words, although not an absolute order in the first instance it became absolute in the sense explained. After the date referred to above had passed the tenant applied to the court for the suspension of the order on the ground that he had paid all arrears and costs, and he did in fact then pay the full amounts due. The county court judge postponed the date for possession mentioned in the earlier order to a future date and, then, having noted that the full amounts due had been paid, discharged the original order. The Court of Appeal held that he was entitled to do so under section 5 (2). Evershed M.R. made some important observations on section 5 (2), on the form of the second order, and on the position in regard to absolute orders for possession. The latter observations are dicta only. As to section 5 (2) (*i.e.*, the subsection substituted by section 4 (2) of the 1923 Act) Evershed M.R. said, "It is, I think, inherent in the language of the subsection, that an order discharging a previous order for possession can only be made where there has been a subsequent order in accordance with the terms of the subsection itself. So far as now relevant, the power of discharge arises where the date of possession in what I will call the first order has been postponed subject to conditions, and those latter conditions have been complied with. I emphasise those last words. The power of discharge depends upon compliance with conditions imposed by what I will call the second order." It may be noted here that the power to postpone possession by a second order can be exercised even though the date for compliance with conditions of payment in the first order has passed and in that sense the first order has become absolute. Evershed

M.R. went on to state the form which the second order should take in this type of case and his guidance should be closely studied by those concerned. Finally, Evershed M.R. amplified an observation made by himself in *American Economic Laundry Ltd.* v. *Little* [1951] 1 K.B. 400, that although the original order is absolute it may under section 4 (2) of the 1923 Act not only be discharged on application but, in effect, converted thereafter into a conditional order. He now explains what he said in the *American Economic Laundry* case as follows:—" I still think it may well be that if an absolute order for possession is made, then, when it is not yet executed, the court may under the section make an order postponing the date of possession on conditions, and, if it did that, then, if the conditions were performed, it may well be that the final words of the subsection would give power to discharge the original order, even though absolute in form. If that is right, then it would justify the language I there used: that an absolute order may be in effect converted into a conditional one, so as to give rise to the power of discharge. But I am not saying anything which would conflict with Somervell L.J.'s expression of opinion that an absolute order, as such, would not be liable to be discharged under the powers of the final terms of the subsection."

(Megarry, 7th ed., pp. 227–230.)

Westminster and Kensington Freeholds Ltd. v. *Holme*
[1955] 1 W.L.R. 272; [1955] 1 All E.R. 581

Rent Restrictions Acts—Increases of rates—landlords' covenant to pay all rates during contractual terms—position at end of term—increases of rates since 1939*—statutory tenant liable to pay increases.*—It was one of the terms of a contractual tenancy (a 14 years' lease) of a dwelling-house within the Rent Restrictions Acts that the landlords should pay the rates, which they did, including various increases in the amount of the rates since 1939. At the end of the contractual tenancy the tenant remained on as a statutory tenant. The landlords claimed that as from the end of the contractual tenancy they were entitled to begin including in the rent the amount of any increases in rates since 1939, by virtue of section 2 (1) (b) of the 1920 Act. The Court of Appeal upheld the landlords' contention and rejected an argument by the tenant that the words " in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date " (September 1, 1939) meant payable by the tenant.

(Megarry, 7th ed., p. 334.)

Anspach v. *Charlton Steam Shipping Co. Ltd.* [1955] 2 W.L.R. 601; [1955] 1 All E.R. 693

Rent Restrictions Acts—standard rent—existing furnished tenancy—subsequent unfurnished letting between associated companies—real

letting and not sham — standard rent fixed.—This case is of some interest as a contrast with *Conqueror Property Trust Ltd.* v. *Barnes Corporation* [1944] K.B. 96, where a letting by a company to an associated company was held to be a sham made merely to establish a fictitious standard rent, not a real letting by a landlord who really intends to let to a tenant who really intends to take, which is required in order to fix the standard rent. In the present case a flat which was the subject of an existing furnished letting was let by a company unfurnished to an associated company (there was an interlocking directorate) with the benefit of the existing furnished tenancy. The rent was a real rent and in fact, although this was not in itself material, probably in accordance with the market value at the time it was fixed. Later the freehold was sold to new landlords who granted an unfurnished tenancy at a higher rent. It was held, on the new tenant's application, that the standard rent was that fixed by the transaction between the associated companies. In coming to this conclusion the Court of Appeal disposed of a number of arguments to the contrary. They held (a) the standard rent can be fixed by a letting other than to a tenant who actually occupies; (b) the fact that the dwelling was occupied at the time by a tenant holding under a furnished tenancy which did not determine the standard rent did not prevent the superior unfurnished letting from determining it; (c) although the unfurnished letting was between companies, so that the tenant could not occupy itself but only by its servants or sub-tenants, it was not for that reason a letting for business purposes which would be excluded from the Acts. None of these points are new, but the decision neatly illustrates them.

(Megarry, 7th ed., p. 287;
Rent Restrictions Guide, 3rd ed., pp. 44, 61.)

Woods v. *Wise* [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767

Rent Restrictions Acts—premium—lump sum representing commuted rent—whether a premium—whether, if a premium, "required" as "a condition" of the grant—admission of extrinsic evidence of transaction.—In this case the question was whether a certain lump sum was a premium required by the landlord as a condition of the grant of a tenancy of a dwelling-house within the Rent Restrictions Acts. The facts were that the sum in question was regarded by both parties as commuted rent, *i.e.*, a capitalisation of the excess of the recoverable rent over the actual rent which it was proposed to charge over the period of the tenancy. The tenant found it more convenient to pay a lump sum in advance and a smaller rent than to pay a higher rent. Extrinsic evidence, which the court held admissible to show the true nature of the transaction (not to vary or contradict the written agreement), established this and made it clear that the landlord was not trying to recover more *in toto* by this method than by charging the recoverable rent as such by normal periodical payments. The evidence did not establish clearly whether the payment of the lump sum was "required" by the landlord or offered on the tenant's initiative. The

Court of Appeal discussed but did not decide the question whether the lump sum was a premium. Evershed M.R. was inclined to the view that in the circumstances the lump sum never lost its character as rent, although prepaid in an unusual form. Romer L.J., however, was inclined to a stricter view. Although apparently conceding that some prepayment of rent might not be a premium, he expressed the view that a payment of substantially the whole of the standard rent in advance would be a premium, notwithstanding the fact that, if it were added to the rent reserved as a periodical payment under the tenancy, and spread over the whole of it, it would not exceed the aggregate standard rent for the period. "It seems to me," he said, "that although the primary object of section 2 [*i.e.* of the 1949 Act] was to prevent landlords from circumventing the disadvantages of the standard rent by demanding a premium in addition to it, a subsidiary object, and one within the language of the section, was to prevent the exaction of payments of a capital nature from tenants who would, in many cases, be unable to raise them." It is also worth noting that Evershed M.R. himself expressed the view that the court would be able to defeat the device of reducing the rent below two-thirds of the standard rent and then charging by way of premium any sum that the landlord could obtain. The court, however, decided the present case on the ground that, whether or not the lump sum was a premium, it was not proved that it had been required by the landlord as a condition of the grant of the tenancy. Birkett L.J. and Romer L.J. put the emphasis on the failure of the tenant to discharge the onus of proving that the payment had been "required" by the landlord at all rather than offered or suggested by the tenant. Evershed M.R. took the view that as the payment of the lump sum was regarded by both parties as part of the total rent it could not be said to be a "condition" of the grant of the tenancy in the sense of section 2 (1) of the 1949 Act. What Evershed M.R. seems to mean is that the payment of the lump sum was part of the consideration in the nature of rent and not a condition precedent to the grant, standing, as it were, outside the consideration, a somewhat subtle distinction.

(Megarry, 7th ed., pp. 337 *et seq.*)

R. v. *Paddington (South) Rent Tribunal, ex p. Millard*
[1955] 1 W.L.R. 348; [1955] 1 All E.R. 691

Landlord and Tenant (Rent Control) Act, 1949—*security of tenure—extension of period—adjournment of hearing before tribunal—period frozen—jurisdiction to grant further extension.*—This is another case on section 11 of the Landlord and Tenant Act, 1949, a section which rent tribunals have had some difficulty in interpreting. The facts were that a tenant of furnished accommodation upon whom a notice to quit had been served had been given two extensions of security of tenure under section 11, the second expiring on March 10, 1954. On a third application, which came before the tribunal on March 10, the landlord asked for an adjournment, as county court proceedings for

possession were pending. The county court proceedings were determined in the tenant's favour, and the adjourned application came before the tribunal on October 25. The tribunal held that it had no jurisdiction as the notice to quit and the extension of it already given had expired. In granting an order of mandamus to the tribunal to hear and determine the application, the Divisional Court pointed out that the tribunal had taken the wrong view of the statute. Section 11 (2) (a) of the 1949 Act freezes the notice to quit, or its extension, until the tribunal has come to its decision. There may then still be a period remaining of the original notice, or of a previous extension. The tribunal may, under section 11 (2) (b), award up to three months further extension, which will be added to what remained when the freezing took effect.

(Megarry, 7th ed., p. 450.)

Scrace v. *Windust* [1955] 1 W.L.R. 475; [1955] 2 All E.R. 104

Rent Restrictions Acts — alternative accommodation — tenant offered part of original dwelling-house after conversion of latter into two self-contained parts—weekly tenancy—proposed alternative accommodation not within Rent Acts—security of tenure not reasonably equivalent.—In this case the landlord sought possession on the ground that suitable alternative accommodation could be provided. The landlord's proposal was to convert the existing dwelling into two self-contained dwellings and offer one of them to the tenant as a weekly tenancy. As a result of section 35 of the Housing Repairs and Rents Act, 1954, the two dwellings produced by conversion would be outside the Rent Restrictions Acts. The Court of Appeal held that a weekly tenancy of such unprotected accommodation could not be regarded as satisfying the requirement of section 3 (3) (b) of the 1933 Act that the alternative accommodation should " afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts." Jenkins L.J. said that the matter might be different if the same accommodation were offered for a term of years instead of on a weekly tenancy. Jenkins L.J. also had some comments (by way of dicta only) on the tenant's contention that a statutory tenant was under no obligation to allow access to the landlord's workmen for the purpose of effecting a conversion in order to produce alternative accommodation for the tenant. Jenkins L.J. expressed the view that in a proper case the court would be able to evolve some way of dealing with such an unreasonable attitude.

(Megarry, 5th ed., p. 280.)

Whitmore v. *Lambert* [1955] 1 W.L.R. 495; [1955] 2 All E.R. 147

Rent Restrictions Acts—section 12 (1) (*g*) *of* 1920 *Act—rule about one transmission—evidence as to position of predecessor—effect of legal estate being outstanding in President of Probate, Divorce and Admiralty Division.*—It is established that the provisions of section

12 (1) (g) of the 1920 Act in regard to the " transmission " of a tenancy can only operate once in relation to any tenancy. It therefore frequently happens that a person claiming such a " transmitted " tenancy is concerned to show that his predecessor did not himself take a " transmitted " tenancy under section 12 (1) (g). This resolves itself into showing that the predecessor was, at least to begin with, a contractual tenant. This was the position in the present case. The facts were complicated but it is only necessary to notice two points. The first is that the court admitted evidence to show that the predecessor's husband had made a will, which was never proved, under which the predecessor was named sole executrix and beneficiary. This evidence was relevant as indicating that the occupation was referable to a contractual right as executrix and not to a statutory right under section 12 (1) (g). The second point was that the fact that (owing to no representation to the predecessor's husband's estate having been taken out) the legal title to the tenancy had remained outstanding in the President of the Probate, Divorce and Admiralty Division, did not prevent reliance by the successor on section 12 (1) (g).

(Megarry, 7th ed., pp. 204–218.)

Orman Brothers Ltd. v. *Greenbaum* [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610

Landlord and Tenant Act, 1954—*notice to quit—prescribed form—notice given after passing of Act but before it came into force— notice not in prescribed form—invalidity.*—It is only necessary to record that the Court of Appeal have upheld Devlin J.'s decision, noted *ante,* p. 64. Devlin J.'s judgment was, said Lord Goddard C.J. (sitting as a member of the Court of Appeal), " entirely right and impeccable."

Castle Laundry (London) Ltd. v. *Read* [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154

Landlord and Tenant Act, 1954—*business premises—tenancy with break clause—notice to terminate—impact of Part* II *of Act—conception of " business statutory tenancy."*—The conception of a " business statutory tenancy " adumbrated by Sellers J. in this case is a somewhat difficult one, and it is to be hoped that serious consideration will be given to its validity before it passes into the current coin of legal language. The facts were that business premises were subject to a lease for twenty-one years from December 25, 1947, with a " break clause " giving either party an option to terminate at the end of the seventh or fourteenth year. The landlord, on June 11, 1954, gave a notice under this clause to terminate the lease on December 25, 1954, a perfectly valid and proper notice in accordance with the terms of the contract. However, the Landlord and Tenant Act, 1954, which was passed on July 30, 1954, and came into operation on October 1, 1954, required a notice to terminate a lease of this kind to be in a

prescribed form, and the notice in question was not in the form prescribed by the Regulations made under the Act. We know from *Orman Brothers, Ltd.* v. *Greenbaum,* noted *ante,* p. 64, that the provisions of the 1954 Act in regard to the prescribed form of notices to terminate apply retrospectively to notices given before the Act came into operation. In the present case the landlord, realising the difficulty caused by the 1954 Act, served a second notice on January 19, 1955, this time in the prescribed form, terminating the tenancy on July 22, 1955. The question then arose whether the second notice effectively terminated the lease, or whether it could not be terminated earlier than the next " break " point, namely December 25, 1961. Sellers J. decided that the lease was effectively terminated, by virtue of the second notice, on July 22, 1955. Both the decision itself, and perhaps still more the reasoning by which it is reached, are not free from difficulty. Sellers J. held that the first notice, although not in the prescribed form, operated to terminate the " contractual " tenancy as from December 25, 1954, but that thereafter the tenancy continued as a " business statutory tenancy " under the Act, which was properly terminated by the second notice. It is doubtful whether this distinction is justified by the Act. An alternative view is that the first notice was nugatory but that the second notice was effective, although the date for the first break had passed before it was served, on the ground that it provided for a date of termination " not earlier " than the earliest date on which, apart from the Act, the tenancy could have been terminated. A third possible view is that, although the notice was in the form prescribed under the Act, it was invalid because it did not conform with the provisions of the tenancy in regard to the date for the exercise of the option to break. A fourth possible view is that the first notice was valid because it was given before the Act was passed and, of course, before the Regulations prescribing forms of notice came into operation, in contrast with *Orman's* case.

(Woodfall, 25th ed., Permanent Supplement, p. 14.)

Aglionby v. *Cohen* [1955] 2 W.L.R. 730; [1955] 1 All E.R. 785

Landlord and tenant—notice to quit—judgment for possession—tenant continues to occupy—entry by landlord without assistance of sheriff—no wrongful entry.—A landlord obtained judgment for possession in default of appearance. The tenant did not deliver up possession. In the tenant's temporary absence the landlord entered the premises and removed the tenant's chattels. The landlord, in other words, resorted to self-help and did not sue out a writ for possession. It was held in the well-known case of *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720 that a landlord may, when the tenancy has come to an end, enter into possession of the premises which were let, using no more force than necessary. In view of a dictum by Patteson J., however, in *Stevens* v. *Lord* (1838) 6 Dowl. 256, 266, Harman J. in the present case considered the question whether, if the landlord has invoked the process of the law by obtaining a judgment, he should rely on the process of the court to gain possession—*i.e.*, should

not make use of his common law right of self-help but leave it to the sheriff to execute a writ of possession. Harman J., after considering a passage in the report of *Lacy* v. *Berry* (1659) 2 Sid. 155, and later pronouncements of textbook writers that the sheriff's assistance is only to preserve the peace and that a plaintiff who has recovered judgment may, if he is willing to take the risk, enter at his own peril, decided the point in the landlord's favour. As Harman J. said, however, this form of self-help may be unwise.

(Woodfall, 25th ed., p. 1266.)

R. v. *Minister of Agriculture and Fisheries, ex p. Graham, and R.* v. *Agricultural Land Tribunal (S. Western Province), ex p. Benney* [1955] 2 W.L.R. 872; [1955] 2 All E.R. 129

Agriculture Act, 1947—*supervision and dispossession orders—provision for hearing of representations—validity of hearing by sub-committee of County Agricultural Executive Committee.*—These cases will be dealt with shortly here, because they were concerned with a point which lies a little outside the ordinary field of landlord and tenant law. As, however, the relationship of agricultural landlord and tenant is affected by the machinery of regulatory and disciplinary powers codified in the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, the cases have some relevance. It is only necessary to say that the decision of the Court of Appeal, reversing the Divisional Court, affirmed the legality of the practice which has in fact been followed since 1948, namely, the appointment of sub-committees of County Agricultural Executive Committees to hear representations in all those cases where individuals are entitled, under the Acts, to make representations to the Minister. The Court of Appeal's view appears, with respect, to be correct, but this litigation shows that section 104 (5) of the Agriculture Act, 1947, is less well drafted than section 80 (5) of the Agriculture (Scotland) Act, 1948, where the inclusion of the word " of " removed ambiguity.

Evans v. *Jones* [1955] 2 W.L.R. 936; [1955] 2 All E.R. 118

Agricultural Holdings Act, 1948 — *Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948—" *to repair and to keep and leave clean and in good tenantable repair, order and condition* "—*interpretation—not limited to condition at commencement of tenancy.*—This case deals with a point of some interest to all concerned with the Agricultural Holdings Act, 1948, including the tenant-right valuers who act as arbitrators under the Act. Put shortly, the decision is that the tenant's obligation under the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948, No. 184) " to repair and to keep and leave clean and in good tenantable repair, order and condition " the items there mentioned means what it says and does not mean *as* clean and in *as* good

tenantable repair, etc., as they were in at the commencement of the tenancy. In determining, however, whether the obligation has been complied with as regards any particular item, regard should be had to its age and character and its condition at the commencement of the tenancy. The county court judge in this case had taken the, it must be admitted, somewhat extraordinary view that the Regulations imposed no liability on the tenant to put the farm, as respects the items in question, in a better condition than when he took over.

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7. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.), *Taxation Reports* (T.R.) or the periodical "*Taxation*" (Taxation).)

C. I. R. v. *Russell* [1955] T.R. 103; 48 R. & I.T. 228; (1955) 55 Taxation 51 (Ct. of Sess.)

Income Tax—settlement on child—step-child

Statutory provision: Finance Act, 1936, s. 21 (now Income Tax Act, 1952, s. 403).

Point: Where under a settlement any income is paid to or for the benefit of a child of the settlor in any year of assessment at the commencement of which the child was an infant and unmarried, that income is treated as income of the settlor for the purposes of income tax (Income Tax Act, 1952, s. 397). The statutory definition of "child" includes a step-child (Income Tax Act, 1952, s. 403). The Court of Session held, reversing the decision of the Special Commissioners, that "step-child" included the infant daughter of the respondent's wife by a previous marriage, which previous marriage had been dissolved by a decree of divorce.

Granville Building Co. Ltd. v. *Oxby* (*H. M. Inspector of Taxes*) [1954] T.R. 161; 47 R. & I.T. 357; 35 T.C. 245 (Ch.D.)

Income Tax—profits of trade—investment

Statutory provision: Case I of Schedule D of the Income Tax Act, 1918 (now Income Tax Act, 1952, s. 123).

Point: In deciding whether a transaction is the realisation of an investment, and the profit arising a "capital" appreciation, or a transaction in the course of carrying on of trade, and the profit an

"income" profit of that trade, if the person concerned is a company, the objects clause of the memorandum of that company may be of considerable importance. In drafting the memoranda of private companies thought should be given to the taxation aspects of the company's foreseeable activities. The memorandum in the present case would appear to have been in the "common form" with the mere addition of one or two objects particularly directed to the main purpose of the company.

Facts and decision: The appellant company at all times had a nominal capital of £100, and its principal object was to carry on the business of builders and of developing and turning to account any land acquired by the company. In 1938 when the company was considerably in debt to the bank and a building society it built two houses. These houses were treated in the accounts as stock-in-trade until 1942. The secretary of the company gave evidence to the effect that the directors had always intended these two houses as an investment. Pursuant to a resolution of the directors in May, 1942, the houses were thenceforth shown in the accounts as investments. One of the houses was sold to the sitting tenant in January, 1950, and a profit realised. The General Commissioners held that the profit was assessable under Case I of Schedule D for the year 1950/51, and the company requested them to state a case for the opinion of the High Court.

Held: There was ample ground on which the commissioners could reach the conclusion of fact which they did reach. Harman J., who expressed the view that the Commissioners' conclusion was not only supported but correct, laid emphasis on the fact that the objects of the company were "not the objects of an investment company at all." He added (at 35 T.C. pp. 249–50) "the only power to invest is a power to invest money not immediately required. This cannot be said to be the power exercised here because the company was overdrawn some thousands of pounds at the bank at the time these houses were built." Distinguishing *Harvey* v. *Caulcott*, 33 T.C. 159 (a private individual who both traded as a builder and invested in houses) the judge commented (35 T.C., at p. 250): "The company is not an investment company which could make investments of this sort which were not part of its trading assets. On the facts as stated the company had no right to build these houses except upon the footing that they were exercising the powers which their memorandum gave them."

Heelex Investments Ltd. v. *C. I. R.* [1955] 1 W.L.R. 289; [1955] 1 All E.R. 641; 34 A.T.C. 47; [1955] T.R. 49 (H.L.)

Profits Tax—group assessments on principal company

The judgment of Upjohn J. (noted *ante*, p. 73) was unanimously affirmed. The words "for the purpose of the provisions of this Act relating to [profits tax]" in Finance Act, 1937, s. 22 (2) mean "for the purpose of ascertaining what profits tax, if any, is exigible on the profits of principal and subsidiary companies respectively."

C. I. R. Universal Grinding Wheel Co., Ltd. [1955] 2 W.L.R. 892; [1955] 2 All E.R. 29 (H.L.)

Profits Tax—distribution

Statutory provision: Finance Act, 1947, s. 36 (1) proviso.

Point: The definition of "distribution" in Finance Act, 1947, s. 36 (1), is in extremely wide terms but is cut down by the proviso to that subsection which provides that ". . . no sum applied . . . in reducing the share capital of the person carrying on a trade or business shall be treated as a distribution." The redemption of cumulative preference shares reduces the capital (*Re Serpell & Co., Ltd.* [1944] Ch. 233) and where such redemption can only be made at a premium the whole of the redemption price, *i.e.*, nominal value plus premium, is "applied in reducing the share capital" and is covered by the exemption contained in the aforesaid proviso.

Facts and Decision: The company's five per cent. cumulative participating preference shares of £1 each were each redeemable at a price which was the nominal value of such share plus a premium of 7s. and a sum equal to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less tax) calculated down to the repayment of capital. It was further provided by the articles that any amount to be applied in redemption of the shares in excess of their nominal amount should only be provided out of profits which would otherwise have been available for dividend on shares ranking behind the preference shares.

In December, 1947, the company redeemed the preference shares at the price of 27s. per share together with a sum equal to certain dividends. An assessment to profits tax was made on the company on the footing that the premium of 7s. per share was "distributed," so that the company did not get relief in respect of the sum so paid. The company appealed and the Special Commissioners allowed the appeal. That decision was upheld by Upjohn J. and the Court of Appeal. The Crown appealed to the House of Lords.

Held, unanimously dismissing the appeal, that the whole sum of 27s. per share was a sum applied in reducing the share capital and therefore not a "distribution." Although the maximum amount by which the capital can be reduced is the amount of the capital itself, namely £1 per share, nevertheless a greater sum than £1 per share can be applied in so reducing the capital.

It should be noted that the decision is strictly confined to the "premium" and does not extend to the additional elements in the stipulated redemption price.

8. *MISCELLANEOUS*

Re Brixham Urban District Council [1955] 1 W.L.R. 426

Rates and rating—withdrawal of appeal by valuation officer—rating authority's title to be heard.—The local authority wished to appeal against the decision of the Divisional Court (noted *ante*, p. 166) which held that, where an appeal by a local valuation officer against a proposal to alter the valuation list was withdrawn, the local authority, which agreed with the proposal, could not insist on the appeal being heard; but the local authority were too slow and did not apply to the Court of Appeal in time. So they went to the Court of Appeal for leave to appeal. The judgment of Singleton L.J. is short and to the point—"We both think that the application is made too late, but speaking for myself alone I think it would have been better, in the ordinary course, if the councils had been heard. I think that that which took place was a hearing at which they were entitled to be heard, but as they have taken so long about it we do not think that we should accede to the application."

Att.-Gen. v. *Colchester Borough Council* [1955] 2 W.L.R. 913; [1955] 2 All E.R. 124

Common law ferry—discontinuance of—remedies.—It may perhaps come as a surprise to find the number of reported cases, and recent ones at that, dealing with the obligations of a ferry-owner. A common law ferry is a species of real property originating in a franchise granted by the Crown. It gives a monopoly in return for which the ferryman is "chained to his oar": he must operate his ferry (see *Hammerton* v. *Dysart* [1916] A.C. 57, 102). The remedies for his failure to do so are in keeping with the oddity of the property: he may be indicted and the Crown can apply for a *scire facias* to repeal the franchise. It seems contrary to all principle for an injunction to be granted, for the order would need constant supervision and the cost of operating the ferry might well exceed the revenue derived, but *Pelly* v. *Woodbridge U. D. C.* (1950) 114 J.P.J. 666 might lead the unwary into a trap, for the Court of Appeal there refused an interlocutory injunction on the ground that it was not an appropriate remedy in the particular case, there being no suggestion that a perpetual injunction was an inappropriate remedy in any case. The trial of the actual suit was not reported but Parker J. held, in a very careful judgment, that an injunction was not an appropriate remedy, though the plaintiff, having suffered damage different in kind and not merely degree from that suffered by the general public, was entitled to damages. In the instant case Lord Goddard C.J. came to the same conclusion as Parker J. in the earlier case, but he declined to award the defendants costs on the ground that they were in default, which seems rather hard.

The difficulty, as may well be imagined, is one of cost of operating the ferry. Many common law ferries are now owned by local

authorities who are controlled in the tolls they may charge by the Minister of Transport under the Ferries (Acquisition by Local Authorities) Act, 1919, s. 1 (2). In other cases the tolls are limited by the grant and, if there is no such limitation, they must be reasonable. Statutory ferries are entirely governed by the particular statutes and, unless they otherwise provide, the owner may charge what he thinks fit and discontinue the service if he so decides.

Re Brown, Brown v. *Knowles* [1955] 3 C.L. 405

Inheritance (Family Provision) Act, 1938—*effect of agreement by testator to leave property by will.*—In this case the deceased gave a legacy of £2,000 to his second wife, and the residue to the three children of the first marriage. His net estate was £11,300 in value. The gift to the children was in fulfilment of a promise made after the death of the deceased's first wife: the children released to him the residuary estate which they took under their mother's will in consideration of the promise. Wynn-Parry J. held, applying *Dillon* v. *Public Trustee of New Zealand* [1941] A.C. 294, that the obligation of the deceased to fulfil his promise did not in any way oust the jurisdiction of the court, nor was it to be looked upon as a decisive circumstance in considering the question of reasonable provision for the applicant. The children probably did not view with detached equanimity the whittling down of their inheritance, derived from their mother, to supplement their step-mother, and may have repented of their filial piety.

Re West Ferry Road, Poplar [1955] 1 W.L.R. 439; [1955] 2 All E.R. 197

Compulsory acquisition—registered land—costs.—On compulsory acquisition, as every articled clerk knows, the acquiring authority pay the vendor's costs. In the case of unregistered land the costs are not in accordance with the scale in Schedule I of the General Remuneration Order, for rule 11 expressly says not: they fall under Schedule II, item charges, though, since the 1953 Order, many local authorities have been prepared to treat the amount under Schedule II as the same as the amount which would have been payable had the costs been calculated in accordance with Schedule I. In the case of registered land, with its very much lower scale, there is no equivalent of rule 11 and it might have been thought unarguable that the scale does not apply to a compulsory purchase had the point not been argued in the instant case. The argument did not prevail, but the learned judge (Harman J.) seemed puzzled why there is a different rule for registered land from that in the case of unregistered, but, having regard to the difference in the scales and, indeed, in the nature of the work involved, it does not appear to us to be so surprising, and it would be a retrograde step to limit the operation of rule-of-thumb scales.

Welch v. *The Bank of England* [1955] 2 W.L.R. 757; [1955] 1 All E.R. 811

Stock in joint names—signature of one holder forged by co-owner.—In *Brewer* v. *Westminster Bank* [1952] 2 T.L.R. 568 McNair J. held that, where two executors had a banking account and it was agreed with the bank that cheques should be signed by both, and one executor signed cheques and forged the second signature, nevertheless the bank was not liable to the innocent executor. The bank, however, only secured a Pyrrhic victory, for when the executor appealed it agreed to compensate him in full and pay his costs, and the appeal was accordingly not proceeded with (see Vol. 17, p. 172). In the instant case a similar point arose: certain Consolidated Stock was registered at the Bank of England in the names of two trustees and one of them converted the stock by forging the signature of his co-trustee on a number of transfers. The bank took every point it could, including negligence, estoppel, lapse of time and the defence successfully raised in *Brewer's* case. Harman J. declined to follow *Brewer's* case. He said: "The point was taken in the defence that as the interest of the plaintiff and Maude [the two trustees] in the stock was a joint one she could have no better right than he to complain. I take it that the pleader relied on the recent case of *Brewer* v. *Westminster Bank,* which appears to have been decided on these grounds. None of the cases in equity [*e.g., Sloman* v. *The Bank of England* (1845) 14 Sim. 475] were cited to the judge. It may be, however, that this would be a good defence at law. It is certainly, I think, no defence in equity." With respect, Harman J.'s clear view on this defence is manifestly just. His whole judgment, dealing with so many matters of interest in this type of case, deserves careful attention.

CORRESPONDENCE

To the Editor,

The Conveyancer and Property Lawyer.

Dear Sir,

The exercise of statutory powers by local authorities

I appreciate Mr. Garner's careful criticism (at p. 75, *ante*) of my article in *The Conveyancer* under the above heading (Vol. 18, at p. 504).

Of course, all the cases I cited depended on "a strict construction of the statute"—that must be so when one writes on the subject of *ultra vires*.

The purpose of my short article was to apply a well-accepted principle of English law to a particular case. I did not attempt to analyse all the authorities for that principle. This has been done so well and so often that I will do no more than refer Mr. Garner to Wade and Phillips, pp. 289–90, Robson, *Justice and Administrative Law*, p. 406, Hood Phillips, 347–8, *Hart*, pp. 388–90 and 10 M.L.R., p. 276 (July, 1947). There Mr. Garner will find ample justification for what I took to be a Grundnorm in this field.

May I also briefly refer to one or two other matters which Mr. Garner seems to think are relevant? It remains to be seen what effect section 33 of the Housing Repairs and Rents Act, 1954, will have upon the law on this matter. Most local authority lettings were outside the Rent Acts even before this. Local authorities will, presumably, still proceed under section 156 of the Housing Act, 1936, when taking proceedings for possession, and it was to proceedings under that section that my article was directed.

The powers of the court in relation to compulsory purchase orders were outside the scope of my article but, in passing, may I record my disagreement with Mr. Garner's view on that question also? Provided application is made in the proper time, I should have thought that the powers of the court could not be doubted. In *Woollett's* case the application was out of time.

I cannot see the relevance of *Att.-Gen.* v. *Leicester Corporation*. It has been said (and doubted so far as municipal corporations are concerned—see *Lumley*, 12th ed., Vol. II, pp. 1643–4) that chartered corporations have the power to do anything private individuals can do. But private individuals cannot act under section 156 (2) of the Housing Act.

Yours faithfully,

W. A. West.

Temple, March 31, 1955.

THE LIBRARY

Woodfall's Law of Landlord and Tenant. 25th Edition. First Supplement (to February 1, 1955). By LIONEL A. BLUNDELL, LL.M., and V. G. WELLINGS, M.A.(Oxon), Barristers-at-Law. Sweet & Maxwell, Ltd. 1955. (6s. 6d.)

This is the first of the periodical supplements to *Woodfall,* which are intended to keep both the main work and the Permanent Supplement (which dealt with the Landlord and Tenant Act, 1954, and the Housing Repairs and Rents Act, 1954) up to date. It is a valuable service to the legal profession to keep a work of the calibre of *Woodfall* up to date, and it is to be hoped that the publishers will arrange for supplements to be prepared at reasonably frequent intervals. The speed with which a textbook becomes out of date nowadays constitutes a problem with which the authors of earlier legal classics were not faced. The only answer is the publication of judiciously spaced supplements between succeeding editions.

This Supplement appears to cover thoroughly the new material which had to be digested, and it is obvious that all who possess the main work and the Permanent Supplement must obtain copies. The only omissions which even a searching scrutiny revealed seemed to be references to Rule 10 of the Lands Tribunal (Amendment) Rules, 1955, and to the case of *Woollett* v. *Minister of Agriculture and Fisheries* [1954] 3 W.L.R. 776, both perhaps a little off the main landlord-and-tenant track.

The publication of the Permanent Supplement and the present Supplement in such a timely manner shows that swiftness is compatible with excellence. Help of this kind lightens the task of the hard-pressed practitioner.

J. M. W.

Dymond's Death Duties. Twelfth edition. By ROBERT DYMOND, former Deputy Controller of the Estate Duty Office, and REGINALD K. JOHNS, LL.B.(Lond.) of the Estate Duty Office. The Solicitors' Law Stationery Society Ltd. 1955. cviii and 1100 pp. (£4 15s.)

The number of important judicial decisions and the considerable changes made by statute in the field of estate duty, in particular by the so-called "chicory" budget of 1954, fully justify this new edition of *Dymond.* It is noted, with regret, that this is the last edition with which Mr. Robert Dymond will be actively associated; he must be congratulated at being one of the select few whose textbooks have come to be treated as "authorities" during the lifetime of the author.

In addition to the incorporation of the many important matters which had previously been dealt with in the supplement to the eleventh edition, the Finance Act, 1954, has been fully considered and the editors, fortunately, have not been afraid of extensively recasting the original text where necessary. In particular the complex provisions contained in section 33 relating to aggregation have been clearly explained with worked examples in the case of settled property and Married Women's Property Act policies. The reviewer found the treatment of the provisions affecting assets valuations in the case of controlled companies well set out, but section 28 (granting new relief

for business assets) appears to be regarded as somewhat simpler than that complex section justifies. For example, no explanation is attempted of the effect of section 28 (10).

Chapter XI, "Policies and interests provided by the deceased," rewritten and much enlarged in the light of *D'Avigdor-Goldsmid* v. *C. I. R.* [1953] A.C. 347 is admirable, and no one will disagree with the decision to deal more fully with the estate duty problems in connection with superannuation funds. Chapter VII, "Gifts inter vivos," has been brought up to date and much of it has been rewritten, including a clear account of the decision in *Sneddon* v. *Lord Advocate* [1954] A.C. 257. The otherwise informative chapter on "Release of limited interests" unfortunately still does not contain an indication of the basis upon which a valuation should be made in the case of the purchase of the reversion by the life tenant or the division of the trust fund between life tenant and remainderman. There being no established practice of actuaries in this matter, some discussion of the principles upon which a valuation should be sought would be most welcome. The short summary of the working of Finance Act, 1940, s. 46, which precedes the full discussion, is courageous, and will prove most helpful to those approaching that topic (or morass!) for the first or even the five-hundredth time.

It is to be hoped that in future editions a practitioner will be added to the editorship to correct the slight tendency to favour the official view and to gloss over *obiter dicta* in support of the taxpayer (see, for example, the treatment of *Re Levens and Melville* [1954] 1 W.L.R. 1228). Surely, also, suggestions that any further "discretion" should be given to the Revenue are to be severely frowned on.

The format of the book is good; nevertheless the time has come for either thinner paper or division into two volumes, preferably the former. The indexing and cross-referencing are good, but greater care could have been taken with the tables of cases and statutes; for instance, a reference to Finance Act, 1954, s. 31 (3) (c) leads the reader only to Chapter I, "Interpretation and construction of the taxing Acts."

The final word must be that this book is essential to all who deal with estate duty, from the probate clerk to the leading tax counsel.

D. R. S.

Heap on the Town and Country Planning Act, 1954. By Desmond Heap. London: Sweet & Maxwell, Ltd. 1955. xv and 215 and (index) 18 pp. (30s.)

This book consists of a short introduction (a general guide to the arrangement of the Act, and four valuable pages of comment upon it); an annotated text of the Act; a set of the relevant Statutory Instruments (not forgetting the Lands Tribunal Rules, printed as amended up to date—a most useful feature); lists of valuation officers and of the Central Land Board's offices; and an index. The primary merit of the book lies, of course, in the annotations, and these fully deserve the wide circulation they have received (they have been used not only for the present book, but also both for *Current Law Statutes* and for Mr. Heap's larger *Encyclopaedia of Planning Law*). It should of course be possible to find one's way about an Act of Parliament, even this Act of Parliament, without the assistance of annotations by Mr. Heap or anyone else; but anyone without unlimited time at his disposal would be well advised to let Mr. Heap do the work for him.

T. A. B. W.

Planning Compensation Valuations. By W. F. Oliver and K. F. Goodfellow. London: Sweet & Maxwell, Ltd. 1955. xv and 308 and (index) 19 pp. (37s. 6d.)

This book, the joint work of a surveyor and a barrister, is concerned with the practical aspects of securing compensation under the Town and Country Planning Act, 1954. The book takes the form of a text of the 1954 Act used as framework on which are hung explanatory comments and specimen valuations. There is a separate chapter on minerals (which present complexities of their own), and the relevant Statutory Instruments are set out in appendices. This book should be regarded, not as a rival to the various annotated editions of the 1954 Act already on the market, but rather as complementary to them: explaining the Act, not in terms of legal principle, but in terms of £ s. d. which may possibly be the simpler approach.

T. A. B. W.

A Guide to the Town and Country Planning Act, 1954. By D. M. Lawrance and P. H. White. Estates Gazette, Ltd. 149 pp. plus ix. (17s. 6d.)

As might have been expected of a book by two members of the staff of the College of Estate Management, this is a well-written, carefully thought out review of the Act from the point of view of the valuer and land agent rather than from that of the lawyer. It is well equipped with specimen calculations, and is written in as easy a style as perhaps is possible with such a complicated subject.

When dealing with legal matters the authors have been content to summarise the effect of the statutory provision and they have left their more useful comments for their own field of valuation. The book is arranged generally in the order of the Act, but it is not comprehensive throughout (for example, the Fourth Schedule is not discussed), and as some sections have had to be considered out of place, it is a pity the authors did not see fit to include an index and/or a table of sections. Some of the diagrams, especially where they consist solely of a square labelled ABCD, are not particularly helpful, but the specimen calculations are extremely illuminating.

Whereas we cannot imagine many lawyers finding a great deal of help from this book, we have no doubt it will answer a need for those for whom it is primarily designed.

J. F. G.

We have also received:—

The Law Quarterly Review. January and April 1955. Stevens & Sons, Ltd. (10s. a part.) The January part contains a careful examination by Mr. Anthony J. Bland of the history of mortmain as it affects leaseholds, concluding that *Morelle, Ltd.* v. *Waterworth* [1954] 3 W.L.R. 257 was wrongly decided. His reasoning is extremely convincing. There is also an interesting article by Professor Austin W. Scott on constructive trusts. The April part contains two further articles of special interest to conveyancers, Mr. H. W. R. Wade's "An Equitable Mortgagee's Right to Possession" and Mr. A. H. Droop's "Powers in Relation to the Rule against Perpetuities." We doubt whether Mr. Wade's argument that an equitable mortgagee's remedies include that of taking possession will convince many.

Buying and Selling a House. Second Edition. By M. Basil Evans. "This is the Law" Series. Stevens & Sons, Ltd. 175 pp. (10s. 6d.) There is a lot of sound advice for the layman, and the economics of house ownership in contrast with those of a tenancy are given careful attention.